IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1917.

No. 513.

October Term, 1918.

No. 197.

Franklin Knight Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office,

Appellants.

vs.

The Pueblo of Santa Rosa,

Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

This is an injunction suit brought by the appellee to enjoin illegal encroachment upon its land. The questions involved are whether the plaintiff can sue as a juridical entity in this

Court and whether the plaintiff has a standing in Court as a landowner and whether it is in any way barred from asserting its rights.

These questions are raised by the appellant's motion to dismiss the complaint.

The Locality.

Papagueria is a so-called desert country, without rivers or transportation, lying along the border of Mexico. It is the last corner of our land, and the land and its inhabitants have been practically forgotten by our people and our government until within a few years.

Some of the land is public domain, but large parts are owned and occupied, and have been since Aztec times, by about twenty Pueblos of civilized Indians.

The plaintiff is one of those Pueblos, which to save itself and its Indians from illegal encroachment of private individuals and government officers—in these days when all the cheap public land has gone—brings this injunction suit.

The Pueblo of Santa Rosa and the Papago Pueblo Indians.

The character of the pueblo and the Indians is fully set out in the bill of complaint, and these allegations are conclusive for present purposes. The complaint alleges:

"I. The plaintiff, the Pueblo of Santa "Rosa, is and from time immemorial has "been a town known by the common name "of Pueblo of Santa Rosa and consisting "of civilized, sedentary, agricultural and "pastural inhabitants who are and from "time immemorial have been pueblo In-"dians known by that name and living in "permanent houses of substantial construc-"tion in a village, of fixed and permanent "location, built upon lands within the pres-"ent County of Pima, State of Arizona, "granted and conceded to said Indian "pueblo by the laws and customs of the "Indians antedating the Spanish discovery "of America and also by the laws of Spain "and Mexico, said lands being within the "territory ceded to the United States by "the Gadsden Treaty, and to whom, as "constituting said pueblo, said laws and "customs conceded certain privileges and "lands, to be used for the common benefit "of the town and its inhabitants.

"The inhabitants of said pueblo live "and from time immemorial have continu-"ously lived together in communal life in "said town community known as the Pueblo "of Santa Rosa. They govern and from "time immemorial have governed them-"selves and their town community in ac-"cordance with definite laws and customs "having the force of law and in their "public and private affairs they obey and "from time immemorial have obeyed said "laws and customs and the lawful orders "of officials elected by them in accordance "with said laws and customs. They at reg-"ular intervals assemble and from time im-"memorial have assembled together in com-"mon council composed of the adult male

"inhabitants of the town and at said coun-
"cils have resolved all matters concerning
"the town community and its inhabitants
"by rules and decisions having the force
"of law. They have from time immemorial
"maintained a high degree of civilization as
"compared with the wild or savage Indian
"tribes and have been peaceable except
"when attacked by savage tribes and have
"always defeated the attacks of such sav-
"age tribes and have never made war on
"white settlers or resisted established gov-
"ernment and have cultivated and utilized
"the lands of their town community with
"much intelligence, skill and industry.

"The inhabitants of said pueblo were at
"the time of the Gadsden Treaty citizens of
"Mexico with large civil and political rights,
"and said inhabitants are now citizens of
"the United States and of the State of
"Arizona and reside in said pueblo of Santa
"Rosa, in said County of Pima and State
"of Arizona."

"The laws and customs of the Indians
"and also the laws of Spain and of Mexico
"at all times conceded to the plaintiff, and
"the plaintiff claims and exercises, and
"from time immemorial has claimed and
"exercised, (1) the right to have a common
"name, to wit, the Pueblo of Santa Rosa,
"and (2) the right and power to take, hold,
"manage, control, and dispose of real and
"personal property, including the land upon
"which its said village is situated and the
"surrounding lands, and (3) the right and
"power to contract and otherwise act as an
"entity by resolutions passed in common
"councils composed of its adult male in-
"habitants, and through its officers and
"representatives, in all matters concerning

"its interests, property and affairs, and (4) "the right and power to have perpetual suc- "cession, and (5) the right and power to "sue and be sued as an entity and to ap- "pear and act as such before courts and "governmental authorities, and (6) the "right and power to maintain a permanent "town organization and government, and "to make, at common councils of its inhab- "itants, rules and laws binding upon the "pueblo and its inhabitants, and to be con- "trolled and managed by its inhabitants act- "ing together according to law and accord- "ing to rules so made, and to elect and keep "in office captains, alcaldes and other town "officers exercising much power and juris- "diction over said pueblo and its property "and inhabitants for their common benefit "and for the maintenance of order, the "preservation of its property, the promotion "of its interests and the conduct of its "affairs."

"By reason of the facts above mentioned "the plaintiff is and from time immemorial "has been, under the laws of Spain and "Mexico and of the United States, an entity "in fact and in law and a juridical person "entitled to sue as such."

"The plaintiff is and from time imme- "morial has been an Indian town commu- "nity and one of many pueblo Indian town "communities situated within the present "and former territory of Mexico, which in "character, organization and activity have "been and are similar to the plaintiff and "which existed as pueblo Indian towns at "the time of the Spanish discovery of "America and at all times since and which "are and at all times have been known and

"designated in Spanish as pueblos de in-
"dios or Indian pueblos. The plaintiff
"brings this suit in its own right."

"III. From time immemorial and since
"before the first explorations of the Spanish
"discoverers and for more than three hun-
"dred years prior to the time of bringing
"this action, the Pueblo of Santa Rosa has
"owned and actually possessed and occu-
"pied all of that certain definite tract or
"parcel of land situate in Pima County in
"the State of Arizona, which land includes
"the village where the inhabitants of said
"pueblo reside and is bounded and described
"as follows: Commencing at a point or
"place known as Kabitque or Mountain
"Logia plain; thence running south a dis-
"tance of twenty-four miles more or less
"to a point or place known as Okama or
"Okomo; thence running west a distance of
"twenty-four miles more or less to a point
"or place known as Mescalero; thence run-
"ning north a distance of thirty miles more
"or less to a point or place, known as
"Sierra Cabeza; thence running east a dis-
"tance of thirty miles or less to the point or
"place of beginning; and containing an area
"of seven hundred and twenty square miles
"more or less. All of said tract of land has
"continuously during all of said period been
"exclusively and actually occupied and pos-
"sessed by said pueblo of Santa Rosa under
"open and notorious claim of right and
"absolute ownership, and said pueblo and its
"inhabitants have during all of this period
"occupied and utilized all of said land for
"the purposes of agriculture and grazing,
"and have resided thereupon. The actual
"boundaries above set forth of said land

"have from time immemorial been definitely "fixed, known and recognized, and are "marked by definite and recognized natural "monuments, and the ownership, possession, "use and occupation of said land by said "pueblo and its inhabitants, for the pur- "poses of agriculture and of raising and "grazing cattle, of building dwellings and "other permanent structures and for all "other purposes, have always been coter- "minus with said boundaries."

"IV. Spain during all the period of its "sovereignty over the territory including "the land herein described at all times rec- "ognized and in no instance disputed the "ownership of said lands by the Pueblo of "Santa Rosa and by repeated royal orders "and decrees, recognized the Papago In- "dians and the inhabitants of said pueblo as "free vassals of the Spanish Crown, en- "titled to all the protection in their proper- "rights which was accorded to Spanish "subjects, and recognized and confirmed "the ownership of plaintiff in said lands. "After the establishment of its sovereignty, "Mexico recognized and never disputed the "ownership of the land herein described "by the Pueblo of Santa Rosa, and during "all of the period of Mexican sovereignty "the Papago Indians and the inhabitants of "the Pueblo of Santa Rosa were Mexican "citizens and entitled to and actually en- "joyed property rights and all other rights "identical with those of all other citizens "of Mexico. Under the laws of Spain and "Mexico the distinction was clearly recog- "nized and established between savage In- "dians or indios barbaros, and peaceable "Indians living in fixed abodes in perma-

"nent communities and subsisting by agri-
"culture and grazing, known as indios de
"los pueblos or pueblo Indians."

"VI. At the time of the acquisition from
"Mexico by the United States of sovereignty
"over the territory comprising said land
"and at the time of the making of said
"treaties the said pueblo of Santa Rosa was
"the absolute owner with complete, perfect
"and undefeasible title to the land herein
"described against all governments and in-
"dividuals and all the world, except such
"rights as pertained to the inhabitants of
"said pueblo as members thereof, and since
"said change of sovereignty this perfect
"title and ownership has continued to exist
"and now exists. The inhabitants of said
"pueblo of Santa Rosa ever since said
"change of sovereignty have been and now
"are actually in possession, use and occupa-
"tion of all of said lands except in so far
"as recently they have been wrongfully dis-
"turbed in said use and occupation by tres-
"passers without color of right or title as
"hereinafter set forth. By the terms of the
"treaties hereinabove mentioned, the owner-
"ship of its lands by said pueblo of Santa
"Rosa was forever guaranteed and secured
"to it by the United States." [Transcript, folios 4 to 7.]

But we need not rely on the appellants' admission; the character of the Papago pueblos is abundantly established by public documents and books of authority.

The History and Character of the Papago Pueblo Indians and Their Pueblos as Shown by the Authorities.

In 1915, Hon. Cato Sells, the Indian Commissioner, in his address at the Lake Mohonk Conference (printed in the 33rd Annual Report of the Lake Mohonk Conference) said:

> "I presume you know something of the Papagos.—I have recently visited them. They live in Southern Arizona on the border of Mexico in the driest desert of the United States. *It has been their home for more than two hundred years.* No branch of the Caucasian race could survive under the conditions existing there. The Papagos have successfully contended against tremendous obstacles. The possession of their lands is now seriously threatened by the invasion of Mexican cattlemen and others. The Papagos are sending up a Macedonian cry for help and we should promptly go to their rescue. The Papago Indians are in all respects deserving of our best efforts. They have been industrious and self-reliant. It is their proud boast that no Papago Indian has ever shed the blood of a white man. The citizens of Arizona are very friendly to them, and this is especially true of Governor Hunt. Nothing affecting any tribe of Indians has aroused my sympathy more, and I want to assure you that the best efforts of which I am capable will be exerted to permanently establish these Indians in the Papago country."

In 1912, Carl Lumholtz, a keen and experienced observer, in his "New Trails in Mex-

ico" the last and best account of the southwestern country, says:

> "It has been the good fortune of the Papagos to live in a country which the white man has not as yet found it profitable to exploit by cattle raising or still less by dry farming. Therefore they have so far been left alone in their native country * * *. The Papagos are above medium height, rather dark in color, and of splendid physique. The women are inclined to be stout. They are a peaceful but at the same time courageous people and show much intelligence. They are hospitable, as becomes a desert people. * * * The Papagos are by no means badly off as a rule and they manage to make a good living where, so far, the white man's efforts have failed. Their herds adapting themselves to the arid conditions, are increasing and making the Indians prosperous and comfortable" (pp. 26 to 28).

In 1913, the following proofs were made before a sub-committee of Congress, either by testimony of Mr. Schenck, for many years connected with Indian affairs and now or recently Superintendent of Irrigation for the Indian Bureau or from formal statements and reports prepared by the Indian Bureau and read into the record. See public document published in 1913 under the title "Indian Appropriation Bill: Hearings before a Sub-Committee of the Committee on Indian Affairs," etc.

"The (Papago) Indians are very industrious farmers so far as their ability will permit", (p. 52). "All the Papagos are naturally industrious", (p. 53). "They are an industrious people and have done remarkably well under adverse conditions", (p. 303). They subsist "on the stock that they raise and they have sometimes small primitive systems of irrigation and do farming. * * * They have developed a good many varieties of beans. * * * This improvement in plant life shows their interest in agriculture. The University of Arizona is studying their problems, and thinks that we can learn something about dry farming from the Indians. * * * They have their own houses. * * * They are built sometimes of adobe brick but more frequently they use the brush mats plastered on both sides, quite sanitary houses. * * * Usually the children are clean and as well clothed as you can expect under these conditions" (p. 305). "They are a bright and energetic people for Indians. Their principal source of revenue is that of stock raising. * * * These Indians have had practically no aid from the government and have been a peaceful and inoffensive tribe at all times and are almost wholly self-supporting at present" (pp. 322-323).

In 1872, General Francis A. Walker, Commissioner of Indian Affairs, gave an official description of the Papagos, which the Secretary of the Interior approved and forwarded to the President. He said (Exec. Docts., 3d Sess., 42d Congress, Report of Sec'y of Int., p. 445):

*"These Indians, numbering about 5,000, are of the same class, in some respects, as the pueblos of New Mexico, living in villages, cultivating the soil, and raising stock for a support. * * * These Indians have no treaty relations with the United States and receive no assistance from the government."*

In 1869, J. Ross Browne, in "Adventures in the Apache Country" (New York, Harper & Bros.,) said (page 110 ff.):

> "In 1860, they sold 400,000 pounds of wheat—all the mail company would purchase. They had more, and furnished the government and private teamsters all that was necessary for transportation from Fort Yuma to Tucson. * * * In 1862, they sold to the government over a million pounds of wheat, included in which was a portion of the previous year's crop, returned to them by the Texans. They furnished pinole, chickens, green peas, green corn, pumpkins, and melons for the entire California column, supporting nearly a thousand men for many months * * *.
>
> "As far back as our knowledge of the Papagos extends they have been a peaceable, industrious, and friendly race. They live here, as they lived two centuries ago, by cultivating the low grounds in the vicinity, which they make wonderfully productive by a system of irrigation."

In 1869, William A. Bell, in "New Tracks in North America" (London, Chapman & Hall) p. 159, said:

> "As a race they (the Papagos) are the finest specimens of men, physically, I have ever seen. * * * The most interesting point * * * is their mode of life * * *. They own flocks and herds in considerable quantities, and they keep large droves of horses, or rather ponies. * * * They have become the greatest traders, and the most industrious people to be found in the country."

In 1868, Col. Roger Jones, Assistant Inspector General, reported on the Indians in Arizona and Southern California as follows. (See report of Commissioner of Indian Affairs, 1869, at page 220).

> "They are industrious, support themselves by cultivation, and manufacture of mats and pottery, in which they are well skilled. * * *
>
> *"Of late years this industrious tribe has been entirely ignored by the Indian Department, and it is not known that any reservation has been designated for them."*

In 1865, Agent M. C. Davidson said, at page 131 of the Report on Indian Affairs for 1865 (Report of Sec'y of Int., 1865, p. 299, Exec. Doct. 39th Congress, Vol. 2):

> "The Papagos were originally from the same stock as the Pimos and Maricopas. These tribes speak a common language, which is conceded to be the ancient Aztec tongue. * * * The Papagos represent that portion of the original people who, while occupying their ancient seats * * * embraced the Christian faith. * * * The

Papagos are probably descended from the most ancient occupants of the continent of whom we have any knowledge; their traditions reach back to a high antiquity, though obscure as to dates. Their unwritten chronicles embrace the epochs of the creation of man, the occurrence of a universal deluge, and the coming of the Spaniards. Until the last named event, their fathers were governed and guided by the great Montezuma, who is clothed according to their dim traditions, with the attributes of a demigod, as well as those of a law-giver, and terrestial king. The status of the Papagos with respect to the soil ought to be determined in a way that no injustice will be done to them. *The Mexican laws, based upon the laws of the Indians promulgated by the Kings of Spain, recognized the Indians as subjects or citizens, and in most cases confirmed to them, wherever they resided in fixed communities, the titles to the lands where they lived. The Spaniards never made treaties with the Indians, nor extinguished the titles to the land,* nor did they in any way recognize them as independent nations. Those who now, by the transfer of the political sovereignty of the country, find themselves upon American soil, and surrounded by Americans, look for at least a measure of recognition of their rights equal to that which they enjoyed under the despotic government of Spain.

"In my opinion, we must regard them as American citizens, and under certain conditions entitled to all their privileges.

"If we inquire into their characteristics as a people, we shall find that they are agriculturists to an extent sufficient to sup-

ply their simple wants. At times they have produced a surplus for their less fortunate white neighbors. As warriors and soldiers, they have for ages maintained their position against the hostile Apaches. As Christians, they have for two hundred years remained the humble but faithful disciples of the church. The conduct of their maidens, wives, and mothers has always been beyond reproach."

The report names the Papago pueblos, including Santa Rosa.

In 1863, the first Superintendent of Indians for Arizona, Charles D. Poston (known as the Father of Arizona) filed with the Secretary of the Interior, a report on Indian affairs in that section, speaking from his personal knowledge. Concerning the Papagos, he said:

"The Papagos inhabit that triangular space of arid land bounded by the Santa Cruz, Gila and Colorado Rivers, and the Mexican boundary line. The first and principal village is at San Xavier del Bac, a church erected by the Jesuits in 1698, and here they have lived and planted and watched their flocks and herds ever since. * * * They raise corn, wheat, barley, beans, peas, melons and pumpkins, and are expert in the manufacture of pottery and willow ware. In harvest time they spread all over the country as reapers and gleaners, returning with their wages of grain for winter. * * * They have horses, cattle, sheep, poultry and great numbers of dogs. As these Indians were found in possession

of the soil they cultivate and have maintained themselves there continuously ever since, it would seem equitable that their rights should be recognized by the government of the United States. * * * The Papagos within our jurisdiction live in 18 different villages and are estimated as follows:

San Xavier del Bac.....	500
Mesquit	500
Fresnal	250
Poso Blanca.....	300
Cumero	500
Alcade	250
Sonoita	500
Cahuabia	350
Chuba	250
Tecotota	500
Mariz	250
Sou Saida.....	250
Santa Rosa.....	400
Periqua	400
Cojota	500
Quejotoa	500
Poso Verde.....	350
Quoto Vaquita.....	250
	6,800"

Mr. Poston's Report for 1865 (Exec. Docts. 2d. Sess., 38th Congress, Vol. V, Report of Sec'y of Int., p. 296), says:

> *"The early Spanish explorer found the Papagos here in 1540, and ruined houses of grand proportions attest their occupancy for thousands of years before the Spaniards came."*

In 1856, the Indian Commissioner reported as follows, (Report of Sec'y of Int.—Senate Doc. 3d. Sess. 34th Cong., Vol. 2):

> "The pueblo Indians maintain their character as peaceable, industrious communities. Some of them have lost the title-papers for the grants of land obtained by them from Spain and Mexico. In such cases their agent has taken testimony in their behalf. They deserve the fostering care of the government, and Congress will no doubt confirm their titles. *About five thousand Indians are embraced within the Gadsden purchase. They are mostly Pueblos and reside in six different villages.* They have houses and flocks, and raise wheat and other products of the soil" (p. 566).

In 1856, the Governor of New Mexico reported on the Pueblo Indians within the territory acquired by the Gadsden purchase and now included in Arizona, being the Papago pueblos. He says (Report of Commissioner of Indian Affairs, 1856, p. 183):

> "A large portion of this accession to our Indian population consists of pueblos, situated near Tucson. * * * They reside in permanent villages, have comfortable houses built of adobes, have flocks and herds around them and rely upon the cultivation of the soil for subsistence—raising wheat, corn, cotton, and other vegetables. They are divided into six pueblos, or villages, but whether or not they hold their lands under grants from the former governments of their country, I am not informed;

but presume they do, as they have been permanently settled for a great number of years."

In 1855, Major Emory, as United States Boundary Commissioner, was examining and surveying the territory of the Gadsden purchase (including the territory now in question) before it came into the actual possession of the United States and his account of the promises made officially by him to the Indians is interesting and important, for it shows that in taking over this land the United States government knew that the Papago pueblos were land owners and not paupers. Major Emory calls the Indians "Pimas," which is a name often applied to the Papagos, but there is no doubt from the names and the context that the Papagos are referred to. Major Emory said (Mexican Boundary Survey, Vol. I, Part I, p. 94.—H. R. Executive Document No. 135, 34th Congress, First Session, 1857):

> "The most considerable and interesting settlement in the new territory is composed of a confederacy of semi-civilized Indians, the Pimos, and Coco Maricopas. * * * I became acquainted with these people in 1846, and in another work eulogized *their advanced state of civilization, their proficiency in agriculture and the art of war, and their morality.* While at Los Nogales * * * a delegation consisting of the chiefs and head men, visited my camp nearly 200

miles distant from their homes, to consult as to the effect upon them and their interests of the Treaty with Mexico, by which they were transferred to the jurisdiction of the United States. I give below a copy of the statement made at the meeting, where it will be seen that I said all in my power to silence their apprehensions. *They have undoubtedly a just claim to their lands,* and if dispossessed will make a war on the frontier of a very serious character.

"I hope the subject will soon attract the attention of Congress as it has that of the Executive, and that some legislation will be effected securing these people in their rights. They have always been kind and hospitable to emigrants passing from the old United States to California, supplying them freely and at moderate prices, with wheat, corn, melons and cotton blankets of their own manufacture."

"Camp at Los Nogales, June 29, 1855. Capt. Antonio Azul, Head Chief of the Pimos; Capt. Francisco Luke, Coco Maricopa Chief; Capt. Malia, Coco Maricopa Chief; Capt. Shalan, a Chief of Gila Pimos; Capt. Ojo de Burro, War Chief of Pimos; Capt. La Baca de Queja, a Chief of Gila Pimos; Capt. Jose Victoriano Lucas, Head Chief of San Xavier Pimos; Capt. Jose Antonio, Chief of San Xavier Pimos, have this day visited my camp for the purpose of ascertaining in what manner the cession of the territory under the treaty with Mexico, will affect their rights and interests. I have informed them that, by the terms of the treaty, all the rights that they possessed under Mexico *are guaranteed to them by the United States;* a title to lands

that was good under the Mexican Government is good under the United States Government. I informed them that in the course of five or ten months, perhaps sooner, the authorities of the United States would come into the ceded territory and relieve the Mexican authorities; until that time they must obey the Mexican authorities, and co-operate with them, as they have done heretofore, in defending this territory against the savage Apaches. I have examined the testimonials given by numerous American emigrants to Azul and his captains bearing testimony to the kindness and hospitality of himself, and the Pimos and Coco Maricopa Indians generally. I can myself bear testimony to the truth of these statements. I therefore call upon all good American citizens to respect the authority of Azul and his chiefs.

(Signed) W. H. EMORY,
U. S. Commissioner,
Major, U. S. A."

In 1762, the Jesuits had twenty-nine missions, "consisting of seventy-three Indian pueblos," of which several were located in the province which afterwards became Arizona and later the Franciscan "priests visited Tubac, Tucson and other pueblos of the Papagos at stated times." (See "Soldiers of the Cross—Notes on the Ecclesiastical History of New Mexico, Arizona and Colorado" (1898), by J. B. Salpointe, formerly Arch-Bishop of Santa Fe, pp. 134 and 181.)

In 1540-42, Viceroy Mendozo ordered an expedition to visit northwestern Mexico, and Padre Castenader who accompanied the expedition shows that the Papagos at that time occupied the same territory in the same way as at present. He says:

> "It is sufficient to say that the people of the Gila River are agricultural, cultivating maize, beans, pumpkins (melons), and cotton. They depend exclusively upon agriculture for their subsistence, dwelling in villages built of mud (adobe)."

The Pueblo of Santa Rosa, According to Authorities.

This pueblo has from time immemorial occupied the valley of Santa Rosa and it is frequently mentioned in the books and records. Thus the United States Surveyor General's report for 1861 includes Santa Rosa in the list of pueblos as "one of the Papago pueblos"; and in his testimony before the Congressional Committee in 1913, Mr. Schenck, Superintendent of Irrigation for the Indian Bureau, mentions Santa Rosa as one of the places "where the villages have been established for a long time and where it is known that the Indians constantly make their homes" and as being one of the largest of the villages (see Public Document entitled "Indian Appropriation Bill: Hearings before a Sub-Committee of the Committee on Indian Affairs," etc., 1913.)

Santa Rosa is described in the "Hand Book of American Indians," Part 2, page 460, and it is shown under that name on the various maps with its subordinate villages and wells.

Lumholtz in his "New Trails in Mexico" (pp. 90, 109) describes the village, giving its native name and saying that it is the largest summer rancheria of the Papago tribe and that the houses are scattered over an area of nearly two miles square and that the Papagos in this village are less spoiled by contact with civilization than in any other part of their country.

The territory in question is considered sacred. The "Hand Book of American Indians," Part 2, page 460, says that the adjacent mountain of Santa Rosa is "a sacred place in Pima and Papago mythology"; and in his report to the Commissioner of Indian Affairs in 1865, Special Agent Davidson wrote as follows, showing clearly the ancient and permanent character of the village:

> "The sacred mountain and village of Santa Rosa is a mecca to the Papagos. According to the ancient legend, after the Great Spirit had formed the earth and all living things, excepting man, he came down to visit his work. Alighting near Santa Rosa, he made a hole in the ground and reascended to the skies taking with him a piece of clay, being the same material with which the Indians to this day make their pottery. From the heavens he dropped

> the clay into the hole already prepared, and from that orifice sprung forth Montezuma, who assisted in the creation of the Papagos and all other Indian races in order." (See Report of Commissioner of Indian Affairs, Executive Document 1248, 1865, to 1866, Vol. 2, p. 299, 1st Session, 39th Congress.)

The valley of Santa Rosa and the pueblo land in that valley are desert lands; Mr. Schenck in his report above cited mentions Santa Rosa as one of the eight villages that need water, and it is natural that the largest Papago pueblo should occupy and use for its herds, summer and winter, a territory, amounting as shown by the bill of complaint, to about 400,000 acres. This is not a large acreage for desert land for a large pueblo. The New Mexican pueblo land is vastly more fertile, and yet the government created for the Zuni pueblo in New Mexico a reservation which with the pueblo lands gives the Zuni pueblo the use of more than 215,000 acres; and in the case of the Arizona Hopis, desert pueblo Indians whose conditions are similar to the Papagos, the government has set aside 2,472,320 acres for the use of only 2,300 Hopis. (See "Hand Book of American Indians," Part 2, p. 374; Part 1, p. 560.)

The Legal Status of the Papago Indians and Their Pueblos.

Under the Spanish and Mexican laws and at the time of the cession the pueblos of the Papagos (as well as all Indian pueblos) were recognized as juridical entities; they were fully organized to conduct their own affairs and to bear their responsibility toward the public; they were regulated and privileged by law, and they had power by law to appear in court and to hold property; and the laws granted and confirmed to them the lands which they occupied and the right to protect those lands in court. Each pueblo held its title as a legal entity.

The Indians themselves were free vassals of the King and had large personal rights and the right to sue.

Under the Mexican rule the Indians were made citizens and put upon an absolute equality with the Spaniards, and their pueblos and the pueblo property were free from restrictions.

All this appears from the following quotations which are taken for the most part from the famous *"Laws of the Indies"* which were begun by decree of Charles V. in 1543 and extended by subsequent decrees of the Spanish Kings until they constituted one of the best codes of law ever promulgated. This code of laws comprehended all the laws of Spain with regard to Spanish America and it determined the per-

sonal rights and property rights and political rights of both Spaniards and Indians in America. We translate and quote from the last edition of the "Laws of the Indies" which was published in Madrid in 1889 but there has been no material change in the text for one hundred years. The keynote of this benificent code was struck by the original decree as published in 1543, showing that the Indians were made free and that their laws and customs were continued and that they were allowed to sue.

We translate from a facsimile of the original published in London in 1893:

> "And because our chief intention and will has always been and is the preservation and increase of the Indians and that they be instructed and taught in the matters of our holy Catholic faith and be well treated *as free persons and our vassals as they are*, etc.
>
> "The audiencias (courts) must not allow that in suits between Indians or in ordinary proceedings at law, any dilatory measures, as is wont to happen, through the malice of some advocate and solicitor, but *that they be determined by strictly observing their customs*, unless they be manifestly unjust and that the said courts take care that this be observed by the other, inferior judges."

Laws of Indies—Book IV, Title 12, Law 14 (1578):

> "Because we have wholly succeeded to the lordship of the Indies and because the

public lands not granted away by the kings, our predecessors, or by us in our opinion belong to our patrimony and royal crown, it is suitable that all the land which is held in possession without just and true titles shall be restored to us as it belongs to us so that, reserving before everything that which to us or our viceroys, courts, or governors may appear necessary for plazas, commons, public lands, pastures and territory of the inhabited villages and towns in view of their present condition as well as of the future and their possible expansion, *and granting to the Indians that of which they may reasonably have need for working the land and making their crops and for their education, confirming them in that which they now have and giving to them in addition that which is necessary*, all the rest of the lands may remain and be free and unencumbered to be disposed of according to our will. Wherefore we order and direct the viceroys and presidents of the pretorial courts that when it appears proper to them they shall announce a suitable limit of time in order that those in possession may exhibit before them and the officers of their courts which may name the titles of the lands, plantations, farms, stock farms, *protecting those who are in possession with good title and guaranties or with just prescription* and they shall return and restore to us the remaining land to be disposed of according to our will."

Laws of Indies—IV, 12, 18 (1642):

"We order that the sale, cultivation and adjustment of lands shall be made with such precautions that *to the Indians shall*

be left the lands which may belong to them, not only as individuals, but also as communities, and the waters and streams and the lands in which may have been made aqueducts or any other improvements by which the lands have been fertilized by their personal industry; these shall be reserved in the first place and in no case shall they be sold or alienated; and the Judges which may be sent shall satisfy the Indians which are found upon the lands and shall leave the lands to each one of the old tributaries, reservados and Indian headmen, governors, absent ones and *communities*."

Laws of Indies—IV, 12, 19 (1646):

"No one shall be allowed to enter into a composition of lands unless he has possessed them for ten years, even though he may allege that he has so possessed them, because this pretext alone must not be sufficient, and *the communities of Indians shall be admitted to composition in preference to the other particular persons, granting to them every convenience*."

Laws of Indies—IV, 1, 23 (*1609*):

"It is just that the Indians shall have time to work their properties and *those of the community* and that the viceroys and governors shall proclaim that which may be necessary, to the end that they can come to their farms," etc.

Laws of Indies—VI, 1, 30:

"Those to whom Indians have been granted cannot succeed to the lands and hereditaments which may be left vacant by reason of the death of the Indians

granted without heir or successors, *and to those lands and hereditaments shall succeed the Pueblos where they resided* up to the amount which may reasonably be necessary for the payment and alleviation of the tributes which were imposed upon them and something more, and the others which may remain shall be applied to our roval patrimony."

Laws of Indies—V, 3, 6 (*1618*):

"In all the Pueblos which have more than one hundred Indians there must be two or three singers and each new Pueblo a sacristan, etc."

Laws of Indies—VI, 3, 15:

"We order that in every Pueblo and new Pueblo there must be an Indian alcalde of that place, and if there are more than 80 houses, two alcaldes and two councilmen, also Indians, and although the Pueblos may be very great, there shall not be more than two alcaldes and four councilmen, and if there should be less than 80 Indians and should amount to 40, no more than one alcalde and one councilman must be chosen on New Years, others, as is practiced in the Spanish and Indian Pueblos in the presence of curates."

Laws of Indies—VI, 3, 16, 18:

"The Indian alcaldes of the new pueblos shall have jurisdiction solely to inquire, arrest and take the delinquents to the prison of the Spanish pueblo of that district; but they can punish with a day in prison and 6 or 8 strokes, the Indian who fails at mass on the day of Fiesta or gets drunk or com-

mits any other similar fault, and if he should be very drunk he must be punished with more rigor; but leaving to the headmen that which may be punished by compelling his Indians to labor. *The government of the pueblo shall be in charge of said alcaldes and councilmen in all respects.*"

Laws of Indies—VI, 3, 29:

"We order that in the Pueblos of Indians there shall be no proprietary officers or officials other than those permitted by the government of each province and because it is ordered that where it may be absolutely necessary the officers of constable and scriveners shall be sold, our will and intention is that these shall be sold only (under) condition that the scriveners be loyal and hold the title of notary as is directed by the general law."

Laws of Indies—VI, 4, 1 (*1619*):

"Having understood that certain excesses and disorders are committed in the administration of *the common property* and mortgages of the Indians, we have found it necessary to remedy this according to the difference of time and occasion under which the different orders were made; and because the matter is of so great importance that it requires special mention, we order our viceroys, presidents, judges and officials to give particular obedience and execution as we charge it upon them that *in the community treasury* shall enter all the common property of the Indians and the instruments and guaranties. *In the community treasury must enter all the property which the body*

and collection of Indians of each pueblo may have, etc."

Laws of Indies—VI, 4, 3 (*1619*)—provides that nothing shall go into the community treasury "*which does not belong to the Indians in common*" and anything else which is put in the community treasury shall *ipso jure* be forfeited and become the property "*of the community.*"

Id. VI, 4, 4—provides that everything coming from this property (the community property) shall be put in a strong box.

Id. VI, 4, 5—directs the officials to ascertain the money in the community treasury which apparently is suitable in quantity and to cause it to be invested in new and safe mortgages "applying to each community that which is bought with this income and rents or making the *pro rata* provided by the foregoing law, but if possible distinct investments must be made *so that each community may have that which belongs to it.*

Id. VI, 4, 6—provides that if an Indian mortgage is redeemed, the amount can be combined with money of another community or other communities and each contributing community shall have a *pro rata* share as shown by the books of account, which must be credited to each of the communities clearly and distinctly.

Id. VI, 4, 9—provides that books of account are to be kept in each community treasury in which shall be entered the "necessary and common expenses of the communities to which they belong." An account must be kept of the mortgages and of the community to which each mortgage belongs. In another book, "must be made an inventory and statement as clear and complete as possible *of the Indians' Pueblos and communities* which hold a part of these mortgages, expressing the amount of rents which belongs to each one and upon what goods it is imposed, etc.

Laws of Indies—VI, 4, 10:

> "We especially desire and order that the *property of the community* shall not be taken by fraud or withdrawn from the Indians and in no case with knowledge or without knowledge, extraordinary or incidental, shall money be taken from their treasuries in small or great quantities by reason of loans, even though it may be agreed to return it immediately to them, not even for payment of guards, or for the benefit of public servants, nor for any other necessities which are or may be called public since no necessity can be more universal or privileged than that of the Indians to whom this property belongs * * *."

Laws of Indies—VI. 4, 22 (*1619*):

> *"The fiscal (district attorney) of the audiencias (high courts) must act in causes bearing upon mortgages and community*

> *goods as he thinks best, being their defender and advocate in everything which there may be, demands, requests, responses, acceptances and other judicial proceedings of every kind,* completing everything as he may be obliged so that the legal proceedings must proceed under his direction, and this is in accordance with that which has been enjoined upon all fiscals for the protection and defense of the Indians and their goods * * *."

Id. 4, 24—provides for accounting for *"everything which belongs to the communities."*

Laws of Indies—VI, 4, 33 (1621):

> "We direct the viceroys and judges of mortgages that every year they cause the Indian councilmen to send them a statement and balance of the amount of the community goods received and of the state of all those treasuries in their districts in order that the councilmen may be more careful and remedy the losses which are necessary and the district attorneys must see to it that this is done."

Laws of Indies—VI, 7, 2 (1558) directs that the courts must hear and decide the claims of Indian headmen and shall restore to the headmen the powers and jurisdiction and rights and rents of which they have been unjustly deprived and "they shall do the same *if any pueblo may have been despoiled of the right which they had to choose headmen.*"

Royal Decree of Instructions Regarding Public Lands, of October 15, 1754, one of the most important Spanish-American Laws ever passed, as it is the basis of very many Mexican titles (1 Legislacion Mexicana, Mexico, 1876, pages 13, 14):

> "The judges and officers in whom is delegated the jurisdiction over the sale and composition of crown lands shall act with lenity, forbearance and moderation, with verbal and not judicial process, in questions of lands possessed by Indians, and of other lands which they (Indians) may need, especially for their work, cultivation and stock raising; *since in regard to lands of communities and those granted to their pueblos for pastures and common lands, nothing new must be done, maintaining them in possession thereof and restoring to them those that have been taken from them and giving them more land as the exigencies of the population require,* and using no rigor in regard to those held by the Spaniards and people of other castes, keeping in mind the provisions of Laws 14, 15, 17, 18 and 19, Title XII, Book IV, of the Compilation of the Indies."

The decree further provides that lands sold or compromised, whether the persons in possession do or do not have deeds, shall be left in the quiet possession of their possessors, with proper notes on their title deeds, etc., and that when there are no title papers, *"it shall be sufficient to prove ancient possession as a title by just prescription."*

Royal Cedula of June 4, 1687 (1 Legislacion Mexicana, page 1) says:

> "It has been considered that it will be convenient to order that to the pueblos of the Indians which need lands for living and to sow, shall be given," whatever lands they may need, with the greatest liberality.

The Mexican Laws After the Separation.

These laws gave great freedom to the Indians and their pueblos. See quotations under our Point V below.

Treaties of Cession.

The treaty of Guadalupe Hidalgo, as changed by the Senate, contained the following paragraph IX:

> "The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible, according to the principles of the Federal Constitution to the enjoyment of all the rights, advantages and immunities of citizens of the United States; *and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property* and the religion which they profess."

There was a protocol between our Government and the Mexican representative as follows:

> "1st. The American Government by suppressing the IXth article of the treaty of Guadalupe Hidalgo and substituting the IIId article of the treaty of Louisiana, did not intend to diminish in any way what was

agreed upon by the aforesaid article IXth in favor of the inhabitants of the territories ceded by Mexico. Its understanding is that all of that agreement is contained in the 3d article of the treaty of Louisiana. In consequence all the privileges and guarantees, civil, political and religious, which would have been possessed by the inhabitants of the ceded territories if the IXth article of the treaty had been retained, will be enjoyed by them, without any difference, under the article which has been substituted.

"2nd. The American Government by suppressing the Xth article of the treaty of Guadalupe did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate (titles) to be acknowledged before the American tribunals.

"Conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories are those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th of May, 1846, and in Texas up to the 2nd of March, 1836."

The treaty as changed and explained by the protocol was ratified by Mexico and ratifications exchanged on May 30, 1848.

The Gadsden Treaty, ratified on June 30, 1854, contains the following:

"Article V. All the provisions of the eighth and ninth, sixteenth and seventeenth

articles of the treaty of Guadalupe Hidalgo, shall apply to the territory ceded by the Mexican Republic in the first article of the present treaty, and to all the rights of persons and property, both civil and ecclesiastical, within the same, as fully and as effectually as if the said articles were herein again recited and set forth."

These treaties were merely declaratory of the general principles of international law, which provide that in case of cession all the personal and property rights of the inhabitants continue, and our rights are not at all confined to the words of the treaties.

History Since 1853.

This has been a history of neglect. Nothing was done for the Papagos before 1874, when the San Xavier reservation, ten miles square, was set apart by the President, and in all these years they have persuaded only about 500 Papagos to come on the reservation—and this is not strange, for they cannot live upon it except as beggars or as day laborers for white men.

In all these sixty years there has been no congressional action whatever covering the Santa Rosa land, or indeed covering any of the Papago land, except that beginning in 1912 Congress has passed one or two small appropriations for the development of a water supply for domestic and stock purposes and for irrigation. The

Government argues that Congress has great powers over all Indian lands and rights; it has no such power over pueblo land, and even if it had, it is enough to say that Congress has not exercised any such power, and neither the chief executives nor other government officials have any such power without congressional action.

During these sixty years there has been constant private encroachment by miners and men who have stolen water and squatted on land. The Government has not protected the Papagos.

During all this time the Papago Pueblos have maintained themselves and their village organization and their civilization without disturbing others and without decrease of their numbers. They have held their own and have advanced—no thanks to the white men.

Our Claim.

Our claim and theory is that our Indian Pueblo is a corporation, that as such it owns the entire tract occupied by the Pueblo and its inhabitants, that it is a juridical entity having a right of recourse to the courts and that the courts can and will protect its rights and title.

The Aggressions of the Defendants.

The plaintiff complains that the defendants, without warrant of law and without any discretionary power or right, are threatening illegal

acts subversive of our rights, and must be enjoined. These are set out in paragraphs VII and VIII of the complaint and not denied. [Transcript, folios 7 to 9.]

The Claim and Theory of the Government.

As we understand it, the Government contends that the Santa Rosa Indians have as against the Indian Commissioner and the Secretary of the Interior absolutely no right of property or person—no right to appear in any court, and if they can appear, no right which can be protected by any court—only a right (?) to stay on their lands at the sufferance of the Government and to beg Congress for charity.

BRIEF OF THE ARGUMENT.

I.

The Pueblo of Santa Rosa can sue as a juridical entity.

Laws of New Mexico of 1847, *published with Laws of New Mexico of* 1852.
9 *U. S. Statutes at Large*, 446.
Statutes of New Mexico of 1852.
10 *U. S. Statutes at Large*, 575.
12 *U. S. Statutes at Large*, 164.
Howell's Code, 1865, p. 439.
Ponce v. The Roman Catholic Church, 210 U. S., 296.

Leitensdorfer v. Webb, 20 How. U. S., 176.

Constitution of Arizona, Article 14, Section 1.

Siete Partidas, Book 1, Title 2, Law 5.

Dillon's Municipal Corporations, 5th Edition, Volume 1, page 71, Section 50.

Terrett v. Taylor, 9 Cranch, 43, 46.

Pawlet v. Clark, 9 Cranch, 292, 328.

Governor v. Allen, 8 Hump., 176.

Alcubilla Diccionario de la Administracion Espanol, Volume 8, page 672.

Mexican Code of 1884, Article 38.

Commonwealth v. Roxbury, 75 Mass., 451.

Spaulding v. City of Lowell, 40 Mass., 71, 78.

City of Lynn v. Inhabitants of Nahant, 113 Mass., 433.

Porter v. Sullivan, 73 Mass., 441.

Hill v. Boston, 122 Mass., 344, 349.

Inhabitants of 4th School District in Rumford v. Wood, 13 Mass., 193.

Handbook of the Indians, page 622.

San Francisco v. United States, Federal Cases No. 12,316.

Townsend v. Greely, 5 Wall., 326.

Knight v. The Land Association, 142 U. S., 161.

Merryman v. Bourne, 9 Wall., 592.

Palmer v. Low, 98 U. S., 1.
Nambe v. Romero, 10 N. M., 58.
Territory of New Mexico v. Delinquent Taxpayers, 12 N. M., 139.
United States v. Pico, 5 Wall., 536.
United States v. Lucero, 1 N. M., 422.
United States v. Varela, 1 N. M., 593.
Devine v. Los Angeles, 202 U. S., 313.
Los Angeles Milling Company v. Los Angeles, 217 U. S., 217.
Laws of New Mexico of 1853-4, page 142, Section 3.
Compiled Laws of New Mexico of 1897, Section 1678.
Zia v. United States, 168 U. S., 198.
Laguna v. Acoma, 1 N. M., 220.
Victor de La O. v. Acoma, 1 N. M., 226.
De Baca v. Pueblo of Santo Domingo, 10 N. M., 38.
United States v. Joseph, 94 U. S., 614. 619.
19 *Land Office Decisions*, 326.

II.

The Pueblo of Santa Rosa has title to this land.

Hamilton on Mexican Law, page 132.
2 *White Recopilacion*, page 562.
Sanchez v. Gonzalles, 11 Martin (La.), 207.

Laws of the Indies, L-4, T-12, L-15.
12 *Manresa Commentaries*, 830.
Siete Partidas, Book 3, Title 29, Law 7.
8 *Alcubilla Diccionario*, 839.
United States v. Santa Fe, 165 U. S., 675, 710.
Crespin v. United States, 168 U. S., 208, 218.
United States v. Lucero, 1 N. M., 422, at page 466.
Hall's Laws of Mexico, Section 159.
Extra Census Bulletin, 1893, page 9.
United States v. Chavez, 175 U. S., 509, 520.
United States v. Chavez, 159 U. S., 452, 464.
United States v. Devereux, 90 Fed. 182, 186 (C. C. A.).
Oaksmith v. Johnston, 92 U. S., 343.
United States v. Pendell, 185 U. S., 189.
Fletcher v. Fuller, 120 U. S., 534.
Penny v. Coke Company, 138 Fed., 769 (C. C. A.).
10 *U. S. Statutes at Large*, 308.
Merryman v. Bourne, 9 Wall., 592.
U. S. Revised Statutes, Section 2126.
Felix v. Patrick, 36 Fed., 457, 461; 145 U. S., 317.
United States v. Joseph, 94 U. S., 614.
19 *Land Office Decisions*, 326.

United States v. Sandoval, 231 U. S., 28, 48.

Carino v. Insular Government of the Philippine Islands, 212 U. S., 449.

III.

The Claim of the Pueblo of Santa Rosa is not barred by failure to assert the same before the Court of Private Land Claims or before Land Commissioners.

Ainsa v. N. M. and Arizona R. R. Co., 175 U. S., 76.

Richardson v. Ainsa, 218 U. S., 289.

IV.

The character and titles of the Papagos and their Pueblos, including Santa Rosa, are established by certain interesting and important cases in the New Mexican Territorial courts, which, although decided with regard to New Mexican Pueblos, apply equally to the similar Papago Pueblos.

United States v. Lucero, 1 N. M., 422.

United States v. Varela, 1 N. M., 593.

United States v. Joseph, 94 U. S., 614, 618.

The Territory of New Mexico v. Delinquent Taxpayers, 12 N. M., 139.

V.

The Pueblo Indians were citizens of Mexico at the time of the cession, and having elected to remain in the United States, they are now, under the treaty, citizens of the United States.

"*Mexico*," by Brantz Mayer, 1854, page 128.

Reynold's Spanish and Mexican Land Laws, 282.

United States v. Ritchie, 17 How., 525, 541.

United States v. Joseph, 94 U. S., 614.

United States v. Lucero, 1 N. M., 422, 425.

VI.

The Papagos are different in every respect from the North American tribes and similar to the civilized North American Pueblo Indians.

Statutes of New Mexico of January 10, 1853; Pamphlet, page 29.

United States v. Joseph, 94 U. S., 614.

United States v. Sandoval, 231 U. S., 28.

Jaeger v. United States and The Yuma Indians, 29 Court of Claims, 172.

VII.

Indian wardship has nothing to do with this case.

United States v. Sandoval, 231 U. S., 28.
United States v. Joseph, 94 U. S., 614.
United States v. Conway, 175 U. S., 60.
Re Kansas Indians, 72 U. S., 737.
Cherokee Nation v. Hitchcock, 187 U. S., 294.
Felix v. Patrick, 36 Fed., 457, 461.
Felix v. Patrick, 145 U. S., 317.

VIII.

The Papago Reservation Order of January 14, 1916, is irrelevant and unimportant except as being in the nature of a further assertion of title by the Government and further aggression by the Government upon the plaintiff's rights, pending the determination of those rights in this Court.

IX.

The executive orders and legislation regarding the Papagos (apart from the reservation order of January 14, 1916, which is discussed above) are entirely unimportant, both because they are irrelevant to the issues and because they are insignificant in amount and unimportant in character.

X.

This suit does not constitute an interference with the administrative functions of the defendants, nor is it a suit against the Government, nor is it an action for trying the title to land.

Gauthier v. Morrison, 232 U. S., 452.
Lane v. Watts, 234 U. S., 525.

XI.

This Court, in the exercise of its appellate jurisdiction, has power to make such disposition of this case as justice may at this time require.

Watts etc. Company v. Unione etc. (decided November 4, 1918).
1 *U. S. Supreme Court Advance Opinions*, 1918-19, 1.

ARGUMENT.

POINT I.

The Pueblo of Santa Rosa can sue as a juridical entity in this Court.

1. IT IS A CORPORATION WITH POWER TO SUE UNDER THE STATUTES OF ARIZONA.

In 1847, when General Kearney was the military governor of the territory now constituting New Mexico, the following statute was duly and validly passed in December, 1847. (See *Law of*

New Mexican Legislature of 1847, officially published with *New Mexican Laws of 1852.*)

> *An Act to Enable Pueblo Indians to Bring and Defend Actions:* "The inhabitants within the territory of New Mexico known by the name of Pueblo Indians, and living in towns or villages built on lands granted to such Indians by the laws of Spain and Mexico, and conceding to such inhabitants certain lands and privileges, to be used for the common benefit are severally hereby created and constituted bodies politic and corporate and shall be known in the law by the name of the Pueblo de ———— (naming it) and by that name they and their successors shall have perpetual succession, sue and be sued, plead and be impleaded, bring and defend in any court of law or equity all such actions, pleas, and matters whatsoever, proper to recover, protest, reclaim, demand or assert the right of such inhabitants, or any individual thereof, to any lands, tenements or hereditaments, possessed, occupied or claimed contrary to law, by any person whatsoever, and to bring and defend all such actions and to resist any encroachment, claim or trespass made upon such lands, tenements or hereditaments, belonging to such inhabitants, or to any individual." (December, 1847.)

This statute was published in Spanish as well as English and there are some indications that the original was in Spanish. Both in the title and in the law itself, the Spanish phrase for Pueblo Indians is "los indios de pueblo," that is "Indian Villages."

In 1850, New Mexico was created a territory by Act of Congress (*9 U. S. Statutes at Large, 446*), which provides (*Section 7*) that the legislative power of the territory be extended to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of that Act.

At the first session of the territorial legislature of New Mexico in 1851, the following statute was passed and approved on July 14, 1852. (*New Mexico Statutes of 1852.*)

> "That all laws that have previously been in force in this Territory that are not repugnant to or inconsistent with the Constitution of the United States, the organic law of the Territory, or any act passed at the present session of the Legislative Assembly, shall be and continue in force, except in Kearney's Code the law concerning Registers of Land."

This carried forward the Kearney statute and made it a part of the Laws of the Territory of New Mexico.

By the Gadsden Treaty, concluded December 30, 1853, and proclaimed June 30, 1854, the Papago Indian land now in question became a part of the United States, and on August 4, 1854, Congress passed the following statute (*10 U. S. Stat. at Large, 575*):

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* that until

> otherwise provided by law the Territory acquired under the late treaty with Mexico, commonly known as the Gadsden Treaty, be and same is hereby incorporated with the territory of 'New Mexico' subject to all the laws of said last named territory."

This made the Kearney statute part of the statutes of the enlarged territory.

By resolution passed February 9, 1854, the New Mexican Legislature ordered that a compilation of the New Mexican statutes should be made, approved by the Governor and published and distributed at the expense of the state. This official compilation was published in 1856, and it included the Kearney statute above quoted as a part of the laws of New Mexico, so that it was not only in theory a part of those laws, but it was published and known as such.

By Act of Congress approved February 23, 1863 (*12 U. S. Statutes at Large, 164*) Arizona was separated from New Mexico and created an independent territory and the act provided that the old act of Congress creating the territory of New Mexico and the acts amendatory thereof *"together with all legislative enactments of the Territory of New Mexico not inconsistent with the provisions of this act are hereby extended to and continued in force in the said Territory of Arizona until repealed or amended by future legislation."*

This made the statute a part of the laws of Arizona.

The newly created territory enacted the so-called *"Howell's Code,"* approved November 10, 1864, by which it repealed all existing laws, but provided that

> "This repeal shall not affect any rights acquired or proceedings had under and by virtue of any such laws, customs, decrees or legislative enactments." (Howell's Code, 1865, p. 439.)

At the date of the repealer, the Pueblo of Santa Rosa had full corporate existence and its corporate character was not affected by the repeal. Indeed, Chapter 25 of *Howell's Code* (which contained the repealer), recognized the existence of villages incorporated under a prior law of Mexico or New Mexico, for it provides that *"any territory not included in any incorporated village"* might be incorporated as a village in the manner provided by the chapter.

At the time of the cession by Mexico and on August 4, 1854, when Congress made the Papago land a part of New Mexico "subject to all the Laws of said territory," and on February 23, 1863, when the Kearney statute was by Congress made a part of the laws of the newly created territory of Arizona, the inhabitants of Santa Rosa complied exactly with the conditions and prescriptions of the Kearney statute. They

were inhabitants of the designated territory; they were "known by the name of Pueblo Indians." They lived in villages "built on lands granted to such Indians by the *laws* of Spain and Mexico," which laws conceded to such inhabitants in their collective capacity "certain lands and privileges to be used for their common benefit."

The statute did not say that the Indians should have grants from Spanish or Mexican officials, but only that they should have lands and rights granted by the law, and as we have shown above, the Mexican and Spanish laws did grant to or recognize in all Indian Pueblos, both property rights and legal privileges. The inhabitants of Santa Rosa were, on August 4, 1854, and on February 23, 1863, known as "Pueblo Indians" or "indios de pueblo"; this was the Spanish name and as it was a Spanish country, there was no question of any English name or of any English usage. The uniform Spanish usage was to call the Indian villages "Pueblos," whether they were constructed of composite houses as in New Mexico or simple houses as in Papagueria and "indios de pueblo" meant and could only mean village Indians. There was nothing technical about it; neither the Spanish usage or English usage confined the phrase "village Indians" or "Pueblo Indians" to the occupants of composite houses, and on the

contrary the phrase was used to distinguish the civilized Indians living in villages from the "barbarous Indians" or "hostile Indians" or "savage Indians." That the phrase "Pueblo Indians" was applied by America at the time to the Papagos is clear from the citations above, and even if it be true that in contemporary speech the words "Pueblo Indians" are sometimes used as meaning only the New Mexican Pueblo Indians, it would not be strange, for those Indians have been widely advertised recently, whereas the Papagos have been unknown.

It is, of course, the usage in 1847 and 1853 and 1863 which determines the effect of the statute.

It is clear, then, that the Kearney statute applied to the Papago Indians and that if the Pueblo of Santa Rosa was not a corporation at the time of the cession, it certainly became a corporation with full power to sue by the operation of the Act of Congress of August 4, 1854, or of the Act of Congress of February 23, 1863. In this aspect each one of these statutes was a valid incorporating act for the Pueblo of Santa Rosa, taking effect fully and at once; any one is sufficient and when incorporated, Santa Rosa necessarily remained a corporation for all time. As a matter of fact, no such incorporation or reincorporation was necessary because Santa Rosa was a corporation by immemorial

and prescriptive right, like the Catholic Church (*Ponce v. The Roman Catholic Church*, 210 U. S., 296), recognized, and if necessary, reincorporated by the effect of the Spanish law above referred to.

The validity of the Kearney Legislation in general was recognized in *Leitensdorfer v. Webb*, 20 How. U. S., 176.

2. THE PUEBLO OF SANTA ROSA WAS EITHER CREATED OR RECOGNIZED AS A CORPORATION BY THE ARIZONA CONSTITUTION.

Article 14, Section 1, provides:

> "The term 'corporation' as used in this Article, shall be construed to include all associations and joint stock companies having any powers or privileges of corporations not possessed by individuals or co-partners and corporations shall have the right to sue and shall be subject to be sued in all courts, in like cases as natural persons."

Here again such re-incorporation was unnecessary, but this constitutional provision prevents any doubt. For if Santa Rosa was not a corporation before the constitution was approved, it was certainly an association having certain "powers or privileges of corporations not possessed by individuals or co-partners," to wit, the power to hold property in a collective capacity, to have succession, to act as an entity, etc. Accordingly this provision of the Constitution

made it clear that it is a corporation with "the right to sue * * * in like cases as natural persons."

3. THE PUEBLO OF SANTA ROSA WAS A CORPORATION BY IMMEMORIAL PRESCRIPTION, UNDER THE SPANISH AND MEXICAN LAW, AND ITS CHARACTER AS A CORPORATION WAS PRESERVED BY THE ORDINARY PRINCIPLES OF INTERNATIONAL LAW AND BY THE TERMS OF THE TREATIES MENTIONED ABOVE AND BY THE NEW MEXICAN STATUTES.

The right to be a corporation and to be recognized as such may be acquired by immemorial user. This is the general law. It is the law of Spain and Mexico, as shown by the old Spanish law stated in *Siete Partidas* (declared in 210 U. S. 312, to be "the fundamental code of ancient Spanish Law"), *Book I, Title 2, Law 5:*

> "A pueblo is the name given to a community of people of every kind of the country where they are gathered together * * * and if for ten or twenty years they have habitually done anything, by way of custom, the Lord of the land knowing it and not objecting and approving, the pueblo, whatever it is, or the greater part of it, can do that thing and it must be held and protected by custom. * * * And, moreover, we say that the custom which the pueblo desires to establish and use must be consistent with right reason and not contrary to the law of God or the Seigniory

> or natural right, nor against the general interests of the land where it is done."

This is also the law in this Court as was proved by the very interesting and important case of *Ponce* v. *Roman Catholic Church*, 210 U. S., 296, where after full discussion and citation, this Court held that the church at common law and by immemorial usage was an entity capable of holding property and bringing suit. The Court says (pp. 313, 319):

> "As to England, the concept of the church as a corporation was worked out by English canonists and fully recognized by the ordinary lower courts before the end of the Fourteenth Century. * * *
>
> "The proposition, therefore, that the church had no corporate or jural personality seems to be completely answered by an examination of the law and history of the Roman Empire, of Spain and of Porto Rico down to the time of the cession, and by the recognition accorded to it as an ecclesiastical body by the Treaty of Paris and by the law of nations."

This has always been the law of England and of this country. Even in Magna Charta, Sec. 16 expressly provides that a "grant" of corporate power shall not be necessary in order to constitute a municipal corporation; and Cooley in his "Constitutional Limitations" page 276, says: "It seems to be the law that the corporate existence may be maintained on the ground of

prescription, that is to say, the exercise of corporate rights for a time whereof the memory of man runneth not to the contrary is sufficient evidence that such rights were once granted by competent authority and are therefore now exercised by right and not by usurpation."

In the same way Dillon in his "Municipal Corporations" (5th Ed. Vol. I, page 71, Sec. 50), says that in England corporations exist "1. By common law; 2. By *prescription*. Corporations at *common law* are those which derive their existence and powers from immemorial usage, although they may have had their origin in an act of Parliament or a royal grant no longer discoverable. Those by *prescription* presuppose a grant by charter or act of Parliament, which has been lost." He further says that:

> "The exercise of corporate powers by a place for twenty years without objection and with the knowledge and assent of the legislature, furnishes conclusive evidence of the charter which has been lost; or in other words, of a corporation by prescription which presupposes a grant".

We may also refer to the following cases:

Terrett v. Taylor, 9 *Cranch*, 43, 46, with regard to Church wardens.

Pawlet v. Clark, 9 *Cranch*, 292, 328.

Governor v. Allen, 8 *Hump.*, 176, with regard to the Governor of a state as a corporation sole.

4. THE CORPORATE CHARACTER OF INDIAN PUEBLOS WAS FULLY RECOGNIZED BY SPANISH LAW AND SPANISH AND MEXICAN STATUTES.

The Spanish law, in force in Mexico, was clear that Pueblos are juridical entities with power to sue. We need quote only from the recognized Spanish Dictionary of Law, *Alcubilla Diccionario de la Administracion Espanol*, Vol. 8, p. 672.

> "*Personality* is the legal ability to appear in law suits."
>
> "*Persons* * * * A juristic person is in law a collective and impersonal moral entity in which the law recognizes certain rights * * * The state or nation, provinces, pueblos (villages), churches, public establishments, societies, etc., are juridical or collective or moral persons because they have their own property, rights and obligations. The exercise of their rights and the payment and performance of certain obligations on the part of moral persons is subject to certain rights which cannot be evaded, as for instance, appeals in a law suit which in some cases requires previous authority and in other cases an administration proceeding, etc."

The same view was held in Mexico after its independence as shown by the definition in the existing Mexican Code, which, although passed in 1884, re-enacted the prior law.

Article 38—

> "The following are moral persons and as such they have juridical entity:

1. The nation, the states and the municipalities.
2. The associations and temporal or perpetual corporations established with any purpose or any motive of public utility or of public and private utility jointly.
3. Civil or mercantile societies formed in accordance with law.

We have quoted largely above from the Spanish statutes recognizing in the Indian pueblos various corporate rights, such as the right to hold real property as an entity and the right to appear in Court through a law officer and the right to perform various functions through its elected officers, etc., etc. There are many more such citations. Any statute recognizing corporate character in such case is conclusive on the subject of corporate character, as is shown in the cases of the New England towns.

Commonwealth v. Roxbury, 75 Mass., 451, saying (p. 500):

> "It is believed that no formal act of incorporation of any town was passed during the existence of the Colonial government," and that (p. 486):
>
> "Lands were allotted and assigned to settlers in severalty and settlements were formed without any previous survey of the territory, and towns as settlements were taxed and vested by general acts with powers, which in effect made them corporations but without bounds or limits."

Spaulding v. City of Lowell, 40 *Mass.*, 71, 78, saying:

> "From this and various other legal provisions, we think it will be found that towns were not originally incorporated with specific and enumerated powers, but that the inhabitants and settlers of each township, as organized bodies, adopted regulations for their common convenience, *and when they were incorporated, or rather recognized by general laws as established corporations*, the powers which they had thus been used and accustomed to exercise were referred to and confirmed under the very broad and comprehensive term 'prudential concerns.'"

City of Lynn v. Inhabitants of Nahant, 113 Mass. 433, saying:

> "Upon the settlement of the Massachusetts Colony (p. 447), the several towns or plantations were at first mere villages or clusters of settlers dwelling near each other; but by successive acts of the General Court, authorizing them to manage their own affairs and to elect representatives and local officers, they soon became in effect municipal corporations, without any express legislative act or charter."

Porter v. Sullivan, 73 Mass., 441.

Hill v. Boston, 122 Mass., 344, 349.

Inhabitants of 4th School District in Rumford v. Wood, 13 Mass., 193.

Held—That the school district could sue as a quasi corporation, lacking some of the general powers of corporations, the Court saying:

> "The same may be said of towns, and other municipal societies which, although recognized by various statutes, and by immemorial usage, as persons, or aggregate corporations, with precise duties which may be enforced, and privileges which may be maintained, *by suits at law*, are yet deficient in many of the powers incident to the general character of corporations. They may be considered under our institutions as quasi corporations, with limited powers, coextensive with the duties imposed upon them by statute or usage."

That the Spanish law and administration recognized and organized and developed the Indian Pueblos is well shown by the following quotation from the Handbook of the Indians, at page 622, in the article on *"Spanish Influence."*

> "The Spaniards made some changes in the method of government of the New Mexican Pueblos, causing each to elect annually a governor and other civil officers, a custom still prevailing."

5. THE CORPORATE CHARACTER OF INDIAN AND SPANISH PUEBLOS IS RECOGNIZED BY OUR COURTS, FOR THEY HAVE REPEATEDLY UPHELD TITLES HELD BY OR DERIVED THROUGH INDIAN AND SPANISH PUEBLOS, AND IN THIS RESPECT THERE IS NO POSSIBLE DISTINCTION BETWEEN INDIAN AND SPANISH PUEBLOS.

Such cases are the following:

San Francisco v. U. S., Fed. Cases No. 12,316.

Townsend v. Greely, 5 Wall., 326.

Knight v. The Land Association, 142 U. S., 161.

Merryman v. Bourne, 9 Wall., 592.

Palmer v. Low, 98 U. S. 1.

Nambe v. Romero, 10 N. M., 58 (Indian Pueblo).

Territory of New Mexico v. Delinquent Tax Payers, 12 N. M., 139 (Indian Pueblo).

U. S. v. Pico, 5 *Wall.,* 536 (Indian Pueblo).

In the following cases the question of title was not directly involved but the language of the court is strong as showing that title was in the pueblos.

U. S. v. Lucero, 1 N. M., 422 (Indian Pueblo).

U. S. v. Varela, 1 N. M., 593 (Indian Pueblo).

In many of the above cases the pueblo titles were confirmed by Congress, but notwithstanding this fact the above cases necessarily hold that the pueblos had title before the confirmation and independent of the confirmation; for it has been held in several cases that the Congressional confirmation does not give a title, that it always presupposes a full right in the pueblo at the time of the cession, and that by the con-

firmation the government merely puts the stamp of its approval upon a pre-existing right either legal or equitable. The above cases show that the pueblos had a full, legal or equitable right to the land at or prior to the cession and thus establish the right to hold title in a corporate capacity. Cases regarding the effect of Congressional confirmation are the following:

Devine v. Los Angeles, 202 U. S., 313.
Los Angeles Milling Co. v. Los Angeles, 217 U. S., 217.

6. BY THE STATUTES OF NEW MEXICO, RE-ENACTED IN ARIZONA AS SHOWN ABOVE, IT WAS PROVIDED THAT THE INDIAN PUEBLOS SHOULD HAVE A RIGHT TO ELECT THE OFFICERS OF THE PUEBLOS "ACCORDING TO THEIR ANCIENT CUSTOMS."

Laws of New Mexico of 1853-4, p. 142, Sec. 3;
Comp. Laws, 1897, Sec. 1678, cited and quoted in 231 *U. S.,* 40.

This statute constituted an important recognition by New Mexico and Arizona of the corporate character of the Pueblos and of the validity of their "ancient customs"; it was as truly a recognition and establishment of these villages as juridical entities as were the New England statutes.

7. THE RIGHT AND POWER OF THE NEW MEXICAN PUEBLOS TO SUE AND BE SUED IS RECOGNIZED BY THE UNITED STATES COURTS, AND THE PAPAGO PUEBLOS MUST EQUALLY BE RECOGNIZED.

In the followinig cases New Mexican Pueblos were allowed to appear as plaintiff or defendant:

Zia v. U. S., 168 U. S., 198.

Laguna v. Acoma, 1 N. M., 220.

Victor de La O. v. Acoma, 1 N. M., 226.

De Baca v. Pueblo of Santo Domingo, 10 N. M., 38.

Nambe v. Romero, 10 N. M., 58.

Pueblos of Santo Domingo and San Felipe v. U. S., 21 Sup. Ct. Rep., 915.

The Pueblos in the cases cited were not debarred from suit on the theory of wardship or on any other theory. If they are wards of the government in any such sense as this (which we deny), the above cases are clear that such wardship does not take away the right to sue. There was no such disability in the Territorial Courts of New Mexico or in this Court.

The right of the New Mexican Pueblo to sue, irrespective of any theory of wardship, is established by the *Joseph* case, 94 U. S., 614, 619:

> "If the defendant is on the lands of the Pueblo without the consent of the inhabitants, he may be ejected or punished civilly

> by a suit for trespass according to the laws regulating such matters in the territory,"

and this suit must necessarily be by the pueblo as a corporation, because this Court recognizes title in the pueblo.

The right of the pueblo to sue is also recognized by the Interior Department, and the Attorney General in 19 *"Decisions of Department of the Interior Relating to Public Lands,"* page 326.

POINT II.

The Pueblo of Santa Rosa has title to this land.

We have shown above that it has power to hold title. We shall show here that it does hold title on one or both of two theories.

1. IT HAS TITLE BECAUSE THE SPANISH LAWS AND DECREES, SUCH AS THOSE WHICH WE HAVE QUOTED ABOVE, HAVE RECOGNIZED ITS IMMEMORIAL TITLE, COMING FROM AZTEC TIMES, OR HAS GRANTED TITLE TO IT.

2. QUITE APART FROM THOSE SPANISH LAWS AND DECREES, THE PUEBLO OF SANTA ROSA HAS TITLE BY PRESCRIPTION UNDER THE SPANISH LAW, OR, WHAT AMOUNTS TO THE SAME THING, BY PRESUMPTION OF LOST GRANT UNDER OUR LAW.

(a) It had at the time of the cession and now has perfect title by prescription under the

Spanish law by reason of immemorial possession.

All the facts necessary for adverse possession under our law and prescription under the Spanish law were present; actual, notorious, permanent and exclusive possession under claim of ownership, within definite boundaries, from time immemorial. All of these facts will appear from the quotations above made, except the definite boundaries, and these are clearly alleged in the complaint and will be proved by the Indians, and must for the purpose of this motion, be considered as established.

By the laws of Spain and Mexico, prescription ran against the King and immemorial possession, and indeed possession for forty years gave a perfect title even as against the state.

Royal Instruction of 1754 (see *Hamilton on Mexican Law,* p. 132) provided that titles coming from the King should be registered and that from those who had no written titles should be required a sworn declaration of local possession which "should suffice as a just title by prescription." This decree was of great importance and has been the basis of judicial decisions regarding Mexican titles down to the present time, and it makes it very clear that a title by prescription is good as against the state.

The law to this effect was also definitely declared by the *"Royal Decree Concerning Crown*

Lands" in the Colonies, of July 16, 1819 (2 White Recopilacion, 562), which provided with regard to crown lands that "in the absence of other title a just prescription, that is, a possession of forty years duly approved according to law shall be admitted and respected." This decree was recognized in 168 *U. S.*, 208, 218. It was the law of the Papago land from 1819 until 1864, when the Howell Code of Arizona was passed, for as is shown above, the Kearney Code continued in force all Mexican laws except as expressly repealed, and these laws thus remained in force until Arizona was separated and until the Howell Code was passed.

Quite apart from this decree, prescription always ran against the state in the Spanish colonies, as was held in a strong opinion in *Sanchez v. Gonzalles*, 11 *Martin* (La.), 207, citing the old laws of the Indies. The following authorties are to the same effect:

Laws of the Indies, L-4, T-12, L-15.
12 Manresa Commentaries, 830.
Siete Partidas, Book 3, Title 29, Law 7.
8 Alcubilla Diccionario, 839.

This Court recognizes that prescription runs against the state under the Spanish law and that titles based thereon are good.

U. S. v. Santa Fe, 165 *U. S.*, 675, 710.
Crespin v. U. S., 168 *U. S.*, 208, 218.

With regard to one at least of the New Mexican Pueblos, which received confirmatory grants from Congress, and whose titles have been repeatedly upheld, there was no written title, but only a title by immemorial possession, and this prescriptive title was upheld by the Court in *U. S. v. Lucero*, 1 *N. M.*, p. 422, at page 466, where the Court held that such a prescriptive title was the best kind of a title and needed no grant or confirmation from the Mexican authorities. It has been held repeatedly that the Congressional confirmation was not the grant of a new title but only a quit-claim to a Pueblo which already had full right under the Mexican law.

This is undoubtedly the theory on which Hall in his *Mexican Law* bases his statement (Sec. 159):

> "It is clear from the whole tenor of the Spanish and Mexican laws, whether in the form of pueblos or ranchos, that the Indians are entitled, in equity and good conscience, and even according to the strict rigor of the laws, to all the lands they have or have had in actual possession for cultivation, pasture, or habitation, when such domain can be ascertained to have had any tolerably well defined boundaries."

It is significant that the executive branch of our government has clearly recognized this principle of Indian pueblo ownership and the

fact of Indian pueblo titles in a closely similar case, that is, the case of the Moqui or Hopi Indians in Arizona. In a report of the pueblos of the Moqui Indians, published as an extra census bulletin in 1893, the action of our government is stated as follows at page 9:

> "The Moqui Indians lived upon lands in Arizona which they were permitted to occupy by the Spanish and Mexican powers, and which became grants by reason of town occupation for a long period. The grants are not yet defined, but were tacitly recognized by President Arthur in his proclamation of December 16, 1882, when he threw about them the protection of a reservation to keep off white people and the Navajos. The Indians are citizens of the United States under the treaty of Guadalupe Hidalgo. Sixteen of the pueblos of New Mexico own their lands in fee and the inhabitants of all are citizens of the United States. The allotment of the lands of the Moqui Pueblos compelling the holders to reside upon them, would abolish the villages and pueblos, disperse these Indians, and make them dependents."

(b) By a somewhat similar reasoning, our Courts reached the same result by holding that where there has been long continued possession even as against the state, the Courts will presume that a grant existed and has been lost.

U. S. v. Chavez, 175 *U. S.*, 509, 520, holding that

> "Upon a long and uninterrupted possession of lands in Mexico, beginning long prior to the transfer of the territory in which they are situated to the United States, and continuing after that transfer, the law bases presumptions as sufficient for legal judgment in favor of the possessor, in the absence of rebutting circumstances." (See headnote.)
>
> "Thus, also, though lapse of time does not of itself furnish a conclusive bar to the title of the sovereign, agreeably to the maxim, *nullum tempus occurrit regi;* yet if the adverse claim could have had a legal commencement, juries are advised or instructed to presume such commencement, after many years of uninterrupted possession or enjoyment. Accordingly royal grants have been thus found by the jury, after an indefinitely long-continued peaceful enjoyment accompanied by the usual acts of ownership. 1 Greenleaf Ev., Sec. 45."
>
> "The principle upon which this doctrine rests is one of general jurisprudence, and is recognized in the Roman law and the codes founded thereon, Best's Principles of Evidence, Sec. 366, and was, therefore, a feature of the Mexican law at the time of the cession."
>
> *U. S. v. Chavez*, 159 *U. S.*, 452, 464.
>
> "It is the general rule of American law that a grant will be presumed upon proof of an adverse exclusive and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et*

de jure whenever by possibility a right may be acquired in any manner known to the law."

To the same effect are the following cases:

U. S. v. Devereux, 90 *Fed.*, 182, 186 (C. C. A.).

Oaksmith v. Johnston, 92 *U. S.*, 343.

U. S. v. Pendell, 185 *U. S.*, 189.

Fletcher v. Fuller, 120 *U. S.*, 534.

Penny v. Coke Company, 138 *Fed.*, 769 (C. C. A.).

That this presumption of lost grant is considered by Congress and is fully recognized by the government officials as applying to Pueblo land is shown by the words of the Commissioner of the General Land Office, who under date of February 17, 1881, wrote a letter of instruction to the Register and Receiver of the Land Office in Arizona, as follows:

> "As a matter of fact, Congress has never confirmed any claim that has been presented to the surveyor general, unless a grant from the former government was established, except in the case of a city or town *found to be in existence when the United States took possession of the territory, when a grant was presumed.*"

3. By legislative and executive action the United States has recognized that the New Mexican and Arizona pueblos have title and that the Papago pueblos are like the New Mexican.

By the *Act of July 22, 1854* (10 *U. S. Statutes at Large*, 308), the surveyor general was directed to make a full report regarding land claims under the laws, usages and customs of Spain and Mexico, "denoting the various grades of title with his decision as to the validity or invalidity of each of the same under the laws, usages and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos respectively and the nature of their titles to the land."

This statute was passed before the addition of the Gadsden territory to New Mexico and accordingly the reports and subsequent action did not include the Papago land.

But in the surveyor general's report for 1861, he reports on all the pueblos in the enlarged New Mexico, including the Papago land, and he gives a list of forty-eight pueblos which include the nineteen New Mexican pueblos whose grants were confirmed in 1858 by Congress, and also eleven Papago pueblos, including the Pueblo

of Santa Rosa as No. 46. There is no distinction in his list or in his report between Papago pueblos and the New Mexican pueblos, consisting of composite houses and having their grants confirmed by Congress—and this was right, for there never was any legal or practical distinction. All stood on the same footing under the Spanish Laws and at the time of the cession and all had their rights equally preserved by treaty, and it is of no consequence that nineteen New Mexican pueblos asserted their titles before the surveyor general, (one at least showing merely a title by immemorial possession, *U. S. v. Lucero,* 1 N. M. 422), while on the other hand the Papago pueblos were ignored in their desert corner and rested quietly on their rights.

That part of the surveyor's list which comprised the Papago pueblos is as follows:

"No.	Name of Pueblo.	1860 Population.	Personal Estate.	Remarks.
21	San Xavier	170	$6,325	Papago pueblo 9 mi. So. of Tuckson old Jesuit Mission.
39	Cumaro			
40	Tecolate			
41	Charco			
42	Pirigua			
43	Ocaboa	*3500	*125,000	
44	Cojate			
45	Coca			
46	Santa Rosa			
47	Cahhavi			
48	Llano			

Papago Pueblos.

*Estimated."

The words "Papago Pueblos" are printed in as shown above.

The above list is prefaced by the following: "Statement showing respectively the names of all the Indian pueblos in New Mexico, with their localities, population, wealth, etc., and the times when their land claims were confirmed by Congress and when surveyed and the areas thereof."

This report is of much importance as showing that the Papagos, including the inhabitants of Santa Rosa were recognized by the government at the time as Pueblo Indians.

4. THE RIGHTS OF THE PUEBLO OF SANTA ROSA WERE FULLY PRESERVED NOT ONLY BY THE TREATY PROVISIONS ABOVE QUOTED, BUT ALSO BY THE PRINCIPLES OF INTERNATIONAL LAW.

Merryman v. Bourne, 9 Wall., 592.
U. S. v. Chavez, 159 U. S., 452, 464.

5. THE PRESUMPTION OF TITLE IS IN FAVOR OF THE PLAINTIFF IN THIS CASE.

The possession of the plaintiff is not disputed and the presumption arises under *U. S. R. S., Section 2126*, as follows:

> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

Felix v. Patrick, 36 Fed., 461 (affirmed 145 *U. S.*, 317), held that this section recognized the right of Indians to sue.

6. THE COURTS HAVE REPEATEDLY RECOGNIZED THAT THE NEW MEXICAN PUEBLOS HAVE TITLE, AND BY INFERENCE, THAT THE SIMILAR PAPAGO PUEBLOS HAVE TITLE.

The language of the *Joseph* case, 94 *U. S.*, 614, is strong to this effect, and in this respect the decision has always been approved. The New Mexican cases cited under Point IV below, are to the same effect.

This has been the consistent holding of the Attorney-General's office and of the Department of the Interior. See letter of Acting Secretary to Commissioner of Indian Affairs, June 30, 1894, quoting Attorney-General's opinion, showing that the New Mexican pueblos had a title which was not subject to control of the government. (19 *Decisions of the Department of the Interior relating to Public Lands*, page 326.)

7. THE COMMUNAL TITLE OF INDIAN PUEBLOS, SUCH AS THAT CLAIMED BY THE PLAINTIFF, IS WELL KNOWN TO AND RECOGNIZED BY THE AMERICAN LAW AS WELL AS THE SPANISH LAW.

That it is recognized by the Spanish law is shown by the quotations from the *Laws of the*

Indies above; the title of the Indian pueblos and Indian communities was repeatedly recognized, expressly and by implication.

As to the American courts, it is sufficient to cite the recent case of *United States v. Sandoval*, 231 U. S. 28, where there came in question the communal title of a New Mexican pueblo, a title which, although expressly confirmed by the United States Government, is of the same fundamental character as that claimed by the plaintiff. This Court recognized that the Indians of each pueblo have a fee simple title to the pueblo lands, and that "it is a communal title, no individuals owning any separate tract; in other words the lands are public lands of the pueblo." (p. 48).

The principles of law upon which the plaintiff's title is based are established by the case of Carino against Insular Government of the Philippine Islands, 212 U. S., 449.

This case arose with regard to Philippine aborigines, much lower in the scale of civilization and development, and institutions than are the civilized and agricultural Papago pueblos; and the principles laid down with regard to the Igorrotes apply more strongly to the Papagos. The case was well considered and most of the propositions above mentioned are sufficiently established by the decision.

1. Under the Spanish law prescription ran against the state in favor of the aborigines. The case cites for this proposition Laws of the Indies, Book 4, Title 12, Law 14, mentioned above, and also the Royal Cedula of October 15, 1754 (cited above) which this court translates as follows: "Where such possessors shall not be able to produce title deeds, it shall be sufficient if they shall show that ancient possession, as a valid title by prescription;" and concludes (p. 461):

> "As prescription, even against crown lands, was recognized by the laws of Spain, we see no sufficient reason for hesitating to admit that it was recognized in the Philippines in regard to lands over which Spain had only a paper sovereignty."

2. The Spanish law recognizes the title of the aborigines to land "irrespective of any royal grant." This Court said, pages 459-460:

> "We hesitate to suppose that it was intended to declare every native who had not a paper title a trespasser and to set the claims of all the wilder tribes afloat. * * * It might, perhaps, be proper and sufficient to say that when, as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish conquest, and never to have been public land. Certainly in a case like this if there is doubt or ambiguity in the Spanish law we ought to give the applicant the benefit

of the doubt. Whether justice to the natives and the import of the organic act ought not to carry us beyond a subtle examination of ancient texts, or perhaps even beyond the attitude of Spanish law, humane though it was, it is unnecessary to decide. If, in a tacit way it was assumed that the wild tribes of the Philippines were to be dealt with as the power and inclination of the conqueror might dictate, Congress has not yet sanctioned the same course as the proper one "for the benefit of the inhabitants thereof."

"If the applicant's case is to be tried by the law of Spain we do not discover such clear proof that it was bad by that law as to satisfy us that he does not own the land. To begin with, the older decrees and laws cited by the counsel for the plaintiff in error seem to indicate pretty clearly that the natives were recognized as owning some lands, irrespective of any royal grant. In other words, Spain did not assume to convert all the native inhabitants of the Philippines into trespassers or even into tenants at will."

3. In territories acquired by treaty from Spain (such as the Philippines) this Court recognizes the aboriginal and immemorial titles of the natives (members of a "savage tribe that was never brought under the civil or military government of the Spanish crown," p. 458), even though those titles are entirely unconfirmed by any act or deed of our government or the Spanish government (pp. 459 to 461). The plaintiff was an Igorot who, with his ancestors,

had held the land as owners for more than fifty years and as far back as the findings go, living upon it and maintaining fences sufficient for cattle, and cultivating part and using part for pasturing cattle; and they had held the land in "accordance with Igorot custom." "No document of title, however, had issue from the Spanish crown" although he had repeatedly made application for one (p. 456). The Court presumes that "when as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership" it was so held before the Spanish conquest and was never public land; and it says that the decrees and laws "indicate pretty clearly that the natives were recognized as owning some land irrespective of any royal grant" (p. 460). Accordingly although both Spain and the United States had refused to grant or confirm the plaintiff's title, this Court held that

> "Upon a consideration of the whole case, we are of opinion that the law and justice require that the applicant should be granted what he seeks (the registration of his immemorial aboriginal title) and should not be deprived of what by the practice and belief of those among whom he lives, was his property, through a refined interpretation of an almost forgotten law of Spain" (p. 463).

The Court mentions *Laws of the Indies*, Book 4, Title 12, Law 14 (above quoted), and says:

> "The fact was that titles were admitted to exist that owed nothing to the powers of Spain beyond this recognition in their books."

4. As regards aboriginal titles, there is a fundamental difference between territory originally acquired or settled, and territory acquired from Spain by treaty.

> "The acquisition of the Philippines was not like the settlement of the white race in the United States. Whatever consideration may have been shown to the North American Indians, the dominant purpose of the whites in America was to occupy the land. It is obvious that, however stated, the reason for our taking over the Philippines was different. No one, we suppose, would deny that, so far as consistent with paramount necessities, our first object in the internal administration of the Islands is to do justice to the natives, not to exploit their country for private gain" (p. 458).

The wording of the treaty of Guadalupe Hidalgo and the circumstances of the case show that the same arguments apply in our case and that the purchase of Southern Arizona from Spain was similar in purpose and in effect on titles to the purchase of the Philippines from Spain.

5. In a case like ours "every presumption is and ought to be against the government" and "certainly in a case like this, if there is doubt or ambiguity in the Spanish law, we ought to give the applicant the benefit of the doubt" (p. 460).

It appears from the Century Dictionary that the Igorots are much less civilized than the Papagos, and if the former are not to be classed with the wild North American Indians, certainly the Papagos can not be so classed.

> "Igorrotes 1. A member of one of the tribes, speaking the Igorrote language, including the Igorrotes proper, the Buriks and the Busaos.
>
> 2. In a generalized sense a member of one of the uncivilized tribes of North Luzon until recently known as head hunters; also rarely used to designate those of Central Luzon and Mindanao.
>
> 3. In local Philippine usage, a savage, a pagan native."

We submit that the Carino case is conclusive as to all questions of native title which arise in our case.

POINT III.

The claim of the Pueblo of Santa Rosa is not barred by failure to assert the same before the Court of Private Land Claims or before Land Commissioners.

The Government may argue that under the *Botiller case in* 130 *U. S.*, 238, and the *Barker* case, 181 *U. S.*, 481, our claim is extinguished because not presented. But those cases are under the act regarding California. But it has been repeatedly held that the California Act and the cases above mentioned have no application to Arizona titles, because under the Arizona statutes (different from the California statute) it was not necessary to present or procure confirmation or recognition of consummated titles, but only of titles which were unconsummated and rested in contract or equity.

Our title was complete and consummated before the cession and the following cases show that such titles require no confirmation and are not barred by failure to present to the Court of Private Land Claims.

Ainsa v. N. M. & Arizona R. R. Co., 175 *U. S.*, 76, saying:

> "A grant of land in New Mexico which was complete and perfect before the cession of New Mexico to the United States, is in the same position as was a like grant in Louisiana or in Florida, and is not in the

position of one under the peculiar Acts of Congress in relation to California; and may be asserted, as against any adverse private claimant, in the ordinary courts of justice" (p. 90).

"And it was accordingly held that a Spanish grant which was complete before the date mentioned in the Treaty *was confirmed by the Treaty itself, needed no confirmation by Congress*, and was not impaired by its rejection by the Commissioners appointed by the President under authority of Congress to examine claims to land in Florida" (p. 82. Referring to *U. S. v. Percheman*, 7 Pet., 51).

Richardson v. Ainsa, 218 *U. S.*, 289, saying:

"But the considerations mentioned in the case cited (*Botiller v. Dominguez*) did not prevent the United States, in the Act of March 3, 1891, from leaving the holders of perfected titles free not to present them to the court as they were required to do in earlier statutes. The good faith of the United States was pledged to respect Mexican titles. It recognized, in the Act of 1891, that holders of such titles need not go into the land claims court to get them confirmed, and we should be slow to suppose that it meant to make a doubt in the Department of Justice as to the validity of a perfect title a ground for cutting down what otherwise was bound to protect and did by statute leave intact."

Our right is a right paramount to the right of the United States, such as was discussed in the *Barker* case, 181 *U. S.*, 481, 492.

POINT IV.

The character and titles of the Papagos and their Pueblos, including Santa Rosa, are established by certain interesting and important cases in the New Mexican Territorial courts, which, although decided with regard to New Mexican Pueblos, apply equally to the similar Papago Pueblos.

We take the liberty of quoting rather fully from these cases because of their weight and importance.

United States v. Lucero, 1 *N. M.*, 422.

This was a prosecution for a violation of the *Non-Intercourse Act* of 1834. It was held that the Pueblo Indians of New Mexico did not come within the provisions of this act because they were not tribal Indians. Their characteristics, history, tenure of their lands and political status are carfully examined by the court in this case. In the course of its opinion the court said:

> (p. 427). "The theory, promulgated by some, and believed by many, that the Spanish adventurers found the pueblo Indians of New Mexico a wild, savage and barbarous race; that they conquered them and reduced them to subjection, placed them in villages, and taught them the arts of civilized life, is a pure and unadulterated fiction and contradicted by the uniform history of the Spanish adventurers for over two hundred years. They found the Pueblo

Indians, on their advent into New Mexico, a peaceful, quiet and industrious people, residing in villages for their protection against the wild Indians, and living by the cultivation of the soil. Their villages are described, their locality mentioned, their habits and pursuits delineated, and we learn that the old palace, not one hundred feet from where we are now holding court, was built upon the site of one of their ancient towns. That the Spanish placed them under subjection, treated them with cruelty, but planted the Catholic religion among them, and an improved civilization, is true; but they found them civilized, peaceful and kind, and on that account they became an easy victim of their cupidity and despotic rule. This condition of domineering on the part of the Spaniards and meek obedience on the part of the Pueblo Indians, continued until 1670, when the Pueblo Indians rebelled against their Spanish masters, and expelled them all from New Mexico. It was not until 1688 that the Spaniards obtained sufficient force to conquer, subdue and chastise them. At the date of 1689, and within a few years subsequent, was executed to the various pueblos of New Mexico their titles to their lands. The Spaniards acknowledged their title to the land on which they were residing, and had resided time whereof the memory of man runneth not to the contrary, and a written agreement was executed and delivered to them; and so long as the Spanish rule was continued in America, these titles were respected. Upon the establishment of the independence of Mexico from old Spain, these titles continued to be respected, and the government of the United States in the

treaty of Guadalupe Hidalgo pledged her faith as a nation to maintain and respect them. When the Republic of Mexico was compelled by the chances of unsuccessful war to part with a portion of her territory and people, she threw around them by treaty all the safeguards to their civil, religious and political rights arising out of honor among men and faith among nations.

* * * * * * *

(p. 429). "Let us now pass to the consideration of the status of the Indian Pueblo of Cochiti and its people as to the Republic of Mexico, and the title by which they held their land at the date of said treaty in 1848, when they passed out of the sovereignty of the Republic of Mexico, and came under the sovereignty of the United States. Were the Pueblo Indians of New Mexico, at the date of the treaty of Guadaloupe Hidalgo, citizens of the Republic of Mexico, and as such entitled to all the protection and benefit of all articles in said treaty, made for the protection of the Mexicans?

* * * * * * *

(p. 430). "The Indians, as they were called of Mexico on account of their numbers, their courage, their patriotism, rendered easy the overthrow of the unjust, arbitrary and partial rule of the viceroys of Spain, and they established upon its ruins the empire of Iturbide, their successful leader. The Spanish scholar will not fail to remember that when Spanish law books and Spanish legislators speak of Indians they mean that civilized race of people who live in towns and cultivate the soil, and are often mentined as *naturales* and *pueblos*, natives of the towns, and as *Indios del*

pueblos, Indians of the towns; and for the other distinct and separate class of Indians whose daily occupation was war, robbery and theft carried on against the Pueblo Indians, as well as the Spaniards, the term savages (*salvajes*) or barbarous Indians (*Indios barbaros*) was the expression used.

* * * * * * *

(p. 431). "When the term Indian is used in our acts of congress, it means that savage and roaming race of red men given to war and the chase for a living, and wholly ignorant of the pursuits of civilized man, for the simple reason that when those laws had been enacted, no such class of Indians as the Pueblo Indians of New Mexico existed within the existing limits of the United States.

"Neither the Spanish crown, its viceroys in the new world, nor the Mexican Republic ever legislated for the savage class of Indians.

* * * * * * *

(p. 432). "It will thus be seen that the Indian race of Mexico, and that portion, and a vast portion, of the inhabitants to whom that term was properly applicable, were recognized as citizens of the Republic of Mexico, in all her plans of government and acts of solemn obligation putting into practical operation that plan.

* * * * * * *

(p. 434). "The Pueblo Indians of New Mexico thus being, at the date of the treaty of Guadalupe Hidalgo, Mexican citizens, they were, by the sixth article of that treaty, made citizens of the United States, inasmuch as not one of them elected 'to retain title and rights of Mexican citizens, but

acquired under that treaty those of citizens of the United States.'

* * * * * * *

"The title of the pueblo of Cochiti was founded in first discovery and occupancy, time whereof the memory of man runneth not to the contrary. The pueblo of Cochiti needed nothing from the King of Spain or his viceroys, nothing from the republic of Mexico or the treaty of Guadaloupe Hidalgo, or acts of the American Congress, to add to the validity of a title to land occupied and cultivated for three hundred years. * * * It has been repeatedly decided by the Supreme Court that a perfect title under the laws of Spain at the time of the change of sovereignty needed no sanction from the legislative or judicial departments of the country. See *United States v. Wiggins*, 14 Pet., 334; *United States v. Kingsley*, 12 Id., 476; *Chouteau v. Eckhart*, 2 How., 348.

"The right of property in the pueblo of Cochiti to the lands granted to them in 1689, was not affected in any manner by the change of sovereignty, as has been repeatedly settled by the Supreme Court, in the case of paper title such as this: See *United States v. Percheman*, 7 Pet., 51; *American Insurance Company v. Canter*, 1 Id., 511; *Strother v. Lucas*, 12 Id., 410.

"It will be thus seen that the title of Cochiti was a perfect title, capable of being asserted in any court."

United States v. Varela, 1 N. M., 593.

This was a suit for a penalty under the *Non-Intercourse Act* of 1834. The Court determined

that the legislation directed against settling on Indian lands did not apply to the pueblo Indians. The Court said (p. 598):

> "Pueblo, as defined in the Spanish language signifies inhabited town or village, and in the plural is used to designate either towns or the inhabitants of towns. As applied to these Indian communities it is significantly descriptive of a race and their habitations, which plainly distinguishes them from the nomadic tribes in their habits; as thus applied it has a popular and well-defined signification in New Mexico. In construing the language of the declaration, is it not proper to apply that signification?
>
> "It is claimed that the term 'Indian tribe,' without other qualifying words, in its ordinary acceptation signifies a tribe between whom and the general government subsist all the relations I have pointed out, which exist between the government and the tribes occupying what in the statute is technically designated as 'Indian country.' Would it not be just as consistent to claim that a pueblo tribe of Indians of a pueblo, in the ordinary acceptation of that phrase, signifies a community living in permanent habitations, constituting a town, subsisting by their own industry in the cultivation of the soil and other branches of husbandry, and carrying on trade and general intercourse with the people of the territory, precisely as do the inhabitants of any Spanish or Mexican town? These are certainly among the distinguishing characteristics of pueblos as commonly understood among the people of New Mexico. To communities with habits such as these, of long standing,

> I apprehend the Courts would meet with grave embarrassments in attempting to apply the penal non-intercourse laws of the United States, in like manner as to nomadic tribes of the 'Indian country.' "

The judgment in this case was affirmed by this Court in *United States v. Joseph,* 94 U. S., 614, 618, where the Court said:

> "Turning our attention to the tenure by which these communities hold the land on which the settlement of defendant was made, we find that it is wholly different from that of the Indian tribes to whom the act of Congress applies. The United States have not recognized in these latter any other than a passing title with right of use until by treaty or otherwise that right is extinguished. And the ultimate title has been always held to be in the United States, with no right in the Indians to transfer it, or even their possession, without consent of the government. * * * It is this fixed claim of dominion which lies at the foundation of the act forbidding the white man to make a settlement on the lands occupied by an Indian tribe. * * * The pueblo Indians, on the contrary, hold their lands by a right superior to that of the United States. Their title dates back to grants made by the government of Spain before the Mexican revolution, a title which was fully recognized by the Mexican government, and protected by it in the treaty of Guadaloupe Hidalgo, by which this country and the allegiance of its inhabitants were transferred to the United States."

The Territory of New Mexico v. Delinquent Taxpayers, 12 New Mexico, 139. In this case the question of the taxability of the Pueblo Indians in New Mexico was before the Court. The Court determined that the Pueblo Indians were citizens of the United States, held title to their lands with full power of alienation, and that the lands of the Indian Pueblos in New Mexico are taxable. The Court said:

> "The single question presented by this record is as to whether the lands of the Pueblo Indians are taxable.
>
> "It would be an inviting task to trace the history of these people since the advent of the Spanish conquerors; but, as this Court has, in a very interesting opinion, dealt with this subject, we content ourselves with reference thereto. *U. S. v. Lucero*, 1 N. Mex., 422.
>
> "They were found a peaceful, industrious and civilized people, living in towns (pueblos) and following agricultural and pastoral pursuits. In 1689, and within a few years subsequent, the Spanish government granted them their lands. So long as they remained under the Spanish rule certain restrictions were placed upon the alienation of their property. Hall's Mexican Law, Secs. 160 and 161. As late as March 13, 1811, they were exempted from taxation. Hall's Mexican Law, Sec. 169. They seem to have been considered by the Spanish as wards of the government and entitled to special privileges and protection.
>
> "But a complete change took place in the status of these people when Mexico threw off the Spanish yoke. Among those en-

gaged in that struggle for independence, this Aztec race far outnumbered the Mexicans and its success was due in a large measure to their efforts. It was but natural and fitting that in the formation of the new government they should take a prominent, if not a leading part, and that they should be placed upon an equal footing as to all civil and political rights. And so we find that the revolutionary government of Mexico, February 24, 1821, a short time before the subversion of Spanish power, adopted what is known as 'The Plan of Iguala' (Iguala was the place of the revolutionary army headquarters), in which it is declared that: 'All the inhabitants of New Spain, without distinction, whether Europeans, Africans or Indians, are citizens of this monarchy, with the right to be employed in any post, according to their merit and virtues;' and that: 'The person and property of every citizen will be respected and protected by the government.' 1 *Ordenes y Decretors*, by Galvan, page 3; *U. S. v. Ritchie*, 17 How. (U. S.), 524, 538; *U. S. v. Lucero, supra.*

"The same principles were reaffirmed in the Treaty of Cordova, of August 24, 1821. 1 *Ordenes y Decretos*, by Galvan, page 6, and in the Declaration of Independence, of October 6, 1821. Id., page 8.

* * * * * * *

"We had then, at the date of the Treaty of Guadalupe Hidalgo, whereby we acquired this territory, a people possessed of all the powers, privileges and immunities of any other citizens of Mexico, and they came to us so endowed as much as any other class of citizens. This, necessarily,

and independent of the provisions of the Treaty of Guadalupe Hidalgo, which so carefully guards the civil rights of all Mexican citizens within the ceded territory, carried with it the right to take, hold and dispose of their property.

* * * * * * *

"The Supreme Court of the United States in *United States v. Joseph*, 94 U. S., 618, in passing upon the nature of the title of these Indians, says:

" 'The Pueblo Indians, on the contrary, hold their lands by right superior to the United States. Their title dates back to grants made by the government of Spain before the Mexican revolution—a title which was fully recognized by the Mexican government, and protected by it in the Treaty of Guadalupe Hidalgo, by which this country and the allegiance of the inhabitants were transferred to the United States.'

* * * * * * *

"It is a matter of history, gathered by the writer from conversations with early residents of the country, that these people were, after the Treaty of Guadalupe Hidalgo and down to the organization of the territory, and perhaps down to the act of 1854, *supra*, regarded by the people as citizens, and as possessed of all the rights of the same. They are reported to have participated in elections, and held office in Pena Blanca and other places in the territory. They sat as grand and petit jurors in the same country of Bernalillo, while Judge H. S. Johnson presided over the same, at one term of court at least.

"We conclude, therefore, that the Pueblo Indians of New Mexico are citizens of New Mexico and of the United States, hold their

lands with full power of alienation, and are, as such, subject to taxation."

POINT V.

The Pueblo Indians were citizens of Mexico at the time of the cession, and having elected to remain in the United States, they are now, under the treaty, citizens of the United States.

That all Indians were made full citizens of Mexico after the separation from Spain is beyond question.

Plan de Iguala ("Mexico," by Brantz Mayer, former Secretary of the Legation to Mexico, 1854, p. 128.)

ARTICLE XI.

"All the inhabitants are citizens and equal and the door of advancement is open to virtue and merit."

The first Mexican Congress which adopted the Plan of Iguala passed the following statute on February 24, 1822 (*Decrees and Orders of the first Mexican Congress*):

"The sovereign Congress decrees the equality of civil rights to all the free inhabitants of the empire, whatever may be their origin, in the four quarters of the earth."

The Mexican decree of May 18, 1847 (*Reynold's Spanish and Mexican Land Laws*, 282), as to constitutional reformation, provided:

ARTICLE I.

"Every Mexican by birth or naturalization who has attained the age of twenty years, who has an honest means of living and who has not been sentenced in legal prosecution to any infamous penalty is a citizen of the United States of Mexico."

U. S. v. Ritchie, 17 How., 525, 541, held that the Indians were Mexican citizens at the time of the Gadsden Purchase.

> "These solemn declarations of the political power of the (Mexican) government had the effect, necessarily, to invest the Indians with the privileges of citizenship as effectually as had the Declaration of Independence of the United States of 1776 to invest all those persons with these privileges residing in the country at the time, and who adhered to the interests of the colonies.
>
> "The plan of Iguala, adopted by the revolutionary government of Mexico, in 1821, and all the successive public documents and decrees of that country, recognized an equality amongst all the inhabitants, whether Europeans, Africans, or Indians; and the decree of 1824, providing for colonization, recognized the citizenship of the Indians, and the right to hold land." (Head Note.)

U. S. v. Joseph, 94 U. S., 614, held that the Pueblo Indians had from the Mexican government full recognition "of all their civil rights, including that of voting and holding office."

The treaty provisions quoted above prove that all Mexican citizens who elected to stay in the

United States should become American citizens, and it must accordingly be that the Papago Indians are now American citizens—and the following case is authority for that proposition, for although decided with reference to New Mexican Pueblo Indians, there can be no distinction.

U. S. v. Lucero (on appeal to the Supreme Court of New Mexico), 1 *N. M.*, 422, 425.

POINT VI.

The Papagos are different in every respect from the North American tribes and similar to the civilized North American Pueblo Indians.

The Government's argument is based on the proposition that the Papagos are like the North American Indians and that the law can recognize no distinction. But the difference is fundamental and has been and must be recognized by the Court.

PAPAGO PUEBLO INDIANS.	NORTH AMERICAN TRIBAL INDIANS.
Living by agriculture, and cattle raising, sedentary and permanent within permanent village boundaries.	Roving within extensive national boundaries.

Peaceful, industrious, frugal and moral.	Warlike, lazy, cruel and bloodthirsty.
Loyal to Spanish government and law-abiding.	Hostile, treacherous and unloyal.
Civilized. Living in organized and permanent villages with annual elections and local village name.	Uncivilized. Living in loose, wandering and shifting tribes with no name except for the tribe or nation.
Living in permanent, substantial houses with valuable improvements, including deep wells made by themselves.	Living in tents.
Mixing and trading freely with whites.	Living in isolation.
Self-governed under local laws.	Incapable of self-government.
Claiming and exercising rights of ownership over real property, by cultivating, improving and using for pasturage within certain and permanent boundaries.	Making no use of real property except for hunting.

PAPAGO PUEBLO INDIANS.	NORTH AMERICAN TRIBAL INDIANS.
Exclusively occupying real property so as to establish title by prescription.	Not occupying real property in a legal sense.
Holding title to real property by decree or grant of Spanish government, preservation by treaty and paramount to title of United States.	Having no title or right of occupancy from any government, but only immemorial occupancy subject to whites' rights of discovery and conquest.
Having the power to convey good title as repeatedly held by our courts.	Having no power whatever to convey good title as is held by our courts.
Protected in personal property and political rights by the Mexican treaties.	Entirely unprotected by Mexican treaties.
Called by the Spaniards "indios de pueblo."	Called by the Spaniards "indios barbaros."

The local statutes have recognized the distinction as they must. The territorial statute of New Mexico of January 10, 1853 (*Pamphlet*, p. 29), prohibited selling of liquor to Indians, but provided that "Pueblo Indians living among us are not included in the word 'Indians,' and the New Mexican law of July 12, 1851, provided for the enforcement of the United States Non-inter-

course Laws with 'savage Indian tribes.' The Arizona territorial statute of December 15, 1868, prohibited selling arms to Indians, but provided that the act should not apply to Pimas, Maricopas, Papagos and tame Apaches."

The usage at the time classed the Papagos together with the New Mexican pueblos as Pueblo Indians.

These distinctions are recognized by the cases. Under "Point IV" above, quoted from the New Mexican territorial decisions showing the broad distinction between Pueblo Indians and wild Indians, and these distinctions were recognized by this Court in

U. S. v. Joseph, 94 U. S. 614, which shows the peaceful and civilized character of the Pueblos and says that in 1834 "there were no such Indians as these in the United States unless it be one or two reservations or tribes such as the Senecas or Oneidas of New York."

> "When it became necessary to extend the laws regulating intercourse with the Indians over our new acquisitions from Mexico, there was ample room for the exercise of those laws among the nomadic Apaches, Comanches, Navajoes, and other tribes whose incapacity for self government required both for themselves and for the citizens of the country this guardian care of the general government.
>
> "The Pueblo Indians, if indeed they can be called Indians, had nothing in common

with this class. The degree of civilization which they had attained centuries before, their willing submission to all the laws of the Mexican government, the full recognition by that government of all their civil rights, including that of voting and holding office, and their absorption into the general mass of the population (except that they held their lands in common), all forbid the idea that they should be classed with the Indian tribes for whom the intercourse acts were made, or that in the intent of the act of 1851 its provisions were applicable to them. The tribes for whom the act of 1834 was made were those semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and in regard to their domestic government, left to their own rules and traditions; in whom we have recognized the capacity to make treaties, and with whom the governments, state and national, deal, with a few exceptions only, in their national or tribal character, and not as individuals.

"Turning our attention to the tenure by which these communities hold the land on which the settlement of defendant was made, we find that it is wholly different from that of the Indian tribes to whom the Act of Congress applies. The United States have not recognized in these latter any other than a passing title with right of use, until by treaty or otherwise that right is extinguished. And in the United States, with no right in the Indians to transfer it, or even their possession, without consent of the government.

> "It is this fixed claim of dominion which lies at the foundation of the act forbidding the white man to make a settlement on the lands occupied by an Indian tribe.
>
> "The Pueblo Indians, on the contrary, hold their lands by a right superior to that of the United States. Their title dates back to grants made by the government of Spain before the Mexican revolution—a title which was fully recognized by the Mexican government, and protected by it in the treaty of Guadalupe Hidalgo, by which this country and the allegiance of its inhabitants were transferred to the United States."

Our adversaries attempt to weaken the force of the Joseph case, but this is impossible. That case was a decision which was based upon the fundamental differences between Pueblo Indians and the Northern tribal Indians and although the statute under consideration is not now in question, nevertheless the same differences which determined the construction and application of that statute are vitally important in this case. The *Sandoval* case (231 U. S., 28) is in no way inconsistent with either the decision or the language of the Joseph case, except that in the latter case this court considers that some of the statements regarding Pueblo Indians in the Joseph case are at variance with later data—and even as to that it is apparent that the attorney for Sandoval did not attempt to put before the court fully the character of the Indians, leaving the court to the one-sided view given by the

quotations read by the government. The case came up on demurrer so that there was no testimony regarding their character.

Moreover the *Sandoval* case itself shows that there are broad and important distinctions between the Pueblo Indians and tribal Indians; and indeed many of the differences above stated are fully justified by the *Sandoval* case.

That case was regarding the extent of police power over pueblos and the court founded its decision very largely upon the theory that long continued executive and congressional action justified the police power; there is no such congressional or executive action with regard to Santa Rosa.

Jaeger v. U. S. & The Yuma Indians, 29 Court of Claims, 172, is another case decided upon the distinction between the tribal Indians and Indians like the New Mexican Pueblos; under the Depredation Statute the plaintiff tried to get compensation for damages caused by the Yumas and because of the character of the Yumas, being the same as the New Mexican Pueblos, it was held that the statute did not apply to the Yumas.

POINT VII.

Indian wardship has nothing to do with this case.

The Doctrine of Indian Wardship.

So far as concerns the wild Indians, occupying lands discovered or conquered by the English, this doctrine is old and well established. It is based upon the character of the wild Indians and the character of their use and enjoyment of the land, their inability to govern themselves and the fact of the discovery and conquest of the country by a superior race, and the courts, viewing and enforcing the action of Congress regarding these dependent peoples and the provision of the constitution giving Congress power to legislate regarding Indian tribes, have said that the wild Indians and wild Indian tribes are in a sense the wards of the nation. Even with regard to wild Indians, this is a very narrow and restricted sense; this wardship means only that Congress may and should protect the wild Indians by legislation, prohibiting the sale of liquor in Indian territory, protecting them from the whites, providing for their places of residence within limits and in some cases regulating their power of managing and conveying their property.

With regard to the New Mexican pueblos and other civilized agricultural Indians on *purchased*

territory in the southwest, the case is quite different; the facts on which the so-called wardship of the wild Indians is based are for the most part absent with the civilized Pueblo Indians, and Congress has only in rare instances legislated for their protection.

Obviously the fact that the wild Indians are wards is no reason for saying that the civilized Indians are wards. Congress must decide in every case whether any particular Indians are wards of the nation and the character and extent of the wardship; as the Sandoval case (231 U. S. 28) well says:

> "In respect of distinctly Indian communities, the questions whether, to what extent, and for what time they shall be recognized and dealt with, as dependent tribes requiring the guardianship and protection of the United States, *are to be determined by Congress and not by the Courts.*"

Naturally, and we think correctly, both this court and the lower courts held that the civilized pueblos are not wards of the nation and are not subject to Congressional restrictions, until the Sandoval case was decided in February, 1913. That case decided that the New Mexican pueblos *are* wards of the nation in the sense that Congress, under the constitution, has the right to pass a statute prohibiting the sale of liquor to them, and it must still be determined what are the limits of this wardship; the fact that the

Sandoval case holds that the Pueblo Indians are subject to Congressional liquor legislation does not indicate that they are subject to every kind of Congressional Indian legislation which has been upheld with regard to wild Indians. For every case depends upon its own facts and the Sandoval case decided nothing except that Congress could prohibit the sale of liquor among the New Mexican pueblos.

Indian wardship is not a status or a disability; it means simply that Indians are subject within limits to the power of Congress to pass protective and restrictive legislation.

"Wardship" is an unfortunate and misleading term, for it reminds us too much of the status and disabilities of the ward who is under guardianship at common law. The true analogy is rather that of interstate commerce, which under the constitution is subject to regulation by Congress, but is absolutely free until Congress does act; or the analogy of women, who under the police power are subject to legislative regulation of their hours of labor but are not under any restriction or disability until the legislature acts.

That Indians are wards only in this Pickwickian sense is clear from all the cases, but it is sufficient to mention the Sandoval case which is the latest case on wardship and the only case on the wardship of Pueblo Indians. This case well describes the doctrine as "the power and

duty of exercising a fostering care and protection over all dependent Indian communities within its borders" (p. 46).

Unless and until Congress acts, Indians and Indian communities are absolutely free and unrestricted in person and property.

This so-called guardianship simply means that Congress has the power to protect and to restrict in order to protect; it is a congressional power and not a power in the courts and obviously until Congress exercises the power, there is no restriction. No disability results from the mere existence of the power in Congress; disabilities can only come from the exercise of the power.

It must be remembered that Congress alone can exercise these guardianship powers. Neither the President nor the Secretary of the Interior or the Indian Commissioner or all together can interfere with the Indian or his property except as authorized by Congress. The power of Congress to restrict does not give the executive branch the power to restrict or to interfere.

And even legislation by Congress is always subject to review in the courts as to its constitutionality; this is a limited constitutional power.

If the Papago pueblos are wards of the nation that fact does not, and can not, concern this case.

Assuming that Congress can impose some restriction or disability upon the plaintiff pueblo

or upon its rights in its lands or its right to alienate its lands, there is no pretense that any such disability *has been* imposed or that any act of Congress to that end *has been* passed. The executive orders creating reservations in the Papago country and the congressional appropriations for wells, etc., are unimportant.

And even if it were true (which it is not) that by act of Congress or by mere fact of wardship, some disability has resulted to the plaintiff with respect to the management or alienation of its lands, such disability could not affect this case; for it would still be true that the plaintiff owns its lands and has the right to come to court for protection against aggression.

That an Indian community may own land even though it is a ward of the nation is proved by the Sandoval case, for the court stated that it was true that the Indians have a communal title "in fee simple," and it nevertheless held that in certain matters the New Mexican pueblos are subject to congressional legislation. The two ideas are quite consistent.

In the same way the fact that an Indian community is a ward does not impair its corporate character or its right to sue. The courts have repeatedly allowed New Mexican pueblos to sue and be sued without the consent of the United States; and in *U. S. v. Joseph*, 94 U. S. 614, this court said that the pueblos can bring suit for the

protection of their rights. Again in *U. S. v. Conway*, 175 U. S. 60, it appeared that in a proceeding in the Court of Private Land Claims "upon motion made by the government upon the consent of all the parties to the proceeding it was ordered on October 11, 1895, that these pueblos (the Pueblos of Nambe and Pojoaque) be made parties and that the petition of the claimant be deemed amended accordingly," showing clearly that the officers of the government considered that these Pueblos had capacity to be sued.

Even with regard to wild Indians, who have always been considered wards of the nation, the courts have always held that Indians have capacity to sue when any Federal question is involved.

Re Kansas Indians, 72 U. S. 737.

Cherokee Nation v. Hitchcock, 187 U. S. 294.

Felix v. Patrick, 36 Fed. 461 (affirmed 145 U. S. 317).

In short, the doctrine of wardship is important for the protection of the Indians but it does not concern the appellee because it is simply a matter of power to protect by congressional legislation and in the absence of such legislation the mere existence of the power does not affect either the corporate character or the land titles of the appellee.

POINT VIII.

The Papago Reservation order of January 14, 1916, is irrelevant and unimportant except as being in the nature of a further assertion of title by the government and further aggression by the government upon the plaintiff's rights, pending the determination of those rights in this court.

The facts are:

1. This presidential order set aside the territory indicated on the photographic map for the use of the Papago Indians, including within its boundaries the plaintiff's villages and its village lands, which lie at about the center of the reservation. Roughly calculated, the territory included in the new reservation amounts to about 4,700 square miles or 3,000,000 acres; and as the total number of Papagos, men, women and children, is, according to the Hand Book of American Indians, only about 2,225, apart from the allotees on the San Xavier reservation (not included in the new reservation) and also excluding 2,233 on the Gila Bend reservation, this executive action stands as a governmental recognition of the fact that in order to make a living in this desert country, the Papagos need the use of about 1,300 acres for each man, woman and child. In the light of this admission it is not surprising that Santa Rosa, the largest and most

important of the Papago pueblos, comprising several hundred Papagos, has immemorially owned and occupied and used and now claims about 400,000 acres.

2. This executive order increases the danger of aggression from prospectors and miners, and this danger is greater than from homestead settlers. The order does not give the Indians the use of the mineral rights or withdraw those rights from entry, and it in effect invites miners to enter and occupy. Moreover the order indicates that the defendant, the Secretary of the Interior, will assume control of all the land within the boundaries as being all Indian reservation land, and thus it constitutes a clear threat of aggression.

3. Moreover the making of the order and the publication of the map is a clear and offensive assertion by the government that all the land within the boundaries is public land and subject to public disposition at the will of the President, and a clear denial of the Indians' titles. In short, it is a cloud upon the plaintiff's title to this land and most harmful to the plaintiff. It is true that the order expressly provides that the order and the reservation shall not affect any private rights and that the power to make Indian reservations does not extend beyond public lands and that a reservation order can not in point of

law affect land privately owned; but nevertheless the publication of this official map, including within its boundaries the plaintiff's great tract of land, is in effect an assertion that the Santa Rosa lands are public lands and a most injurious cloud upon the Santa Rosa titles.

4. It may be true that this great reservation was established in pursuance of the policy followed concerning the New Mexico pueblos, where the government has supplemented the communal pueblo lands by creating around those lands a governmental reservation which serves the double purpose of giving the Pueblo Indians a larger territory for grazing and cultivation (the aggregate territory in the case of the Zuni pueblo being 215,000 acres) and of keeping the whites at a distance. But if this be the purpose of the government, it should in fairness to the Indians have done more; it should have excluded miners and it should, by the wording of the order, have recognized the Indian titles instead of denying them and should have shown, as in the case of the New Mexico pueblos, that the reservation was supplemental to the private holdings of the Indians. If this reservation is a belated recognition by the government of the Papagos' rights and interests, after seventy years of neglect, let the government go further and ensure the prosperity and happiness of the

Papagos forever by recognizing fully and at once their immemorial land titles which were recognized by the Spanish and Mexican governments. If on the other hand this action is only to hold the territory *in statu quo* until the result of this suit, let the government say so frankly.

5. The history of Indian reservations proves that this reservation will not protect the Papagos against the land greed of white men. As soon as the whites want the land and marshal political influence to that end, the reservation order will certainly be attacked and under some later administration it will be modified as suddenly as it was made, and the land will be sold to white men. The only possible protection for the Papago Indians is a land title recognized by the courts; this is the only thing which will make them secure against private greed and political attack.

The Court will take judicial notice of the fact that the old Indian reservation policy—that is, the policy of supporting the Indians upon governmental reservations, as dependents, under the charge of Indian agents—has been a shameful failure, that it has only resulted in degrading, pauperizing and decimating the Indians, that it is condemned by all friends of the Indians and that the government is abandoning it as rapidly as possible.

The Lake Mohonk Conference on the Indian and other dependent peoples in 1895, declared:

> "The reservation system is an insuperable obstacle to civilization and should be abolished."

In 1903 they declared:

> "In dealing with the Indians the objects to be accomplished are no longer questioned; they are the abandonment of the reservation system; the discontinuance of Indian agencies, such education of all Indian children as will fit them for self-support and self-government; access to the courts for the protection of their rights, etc."

H. L. Dawes, formerly Indian Commissioner, Vol. 84 Atlantic Monthly, p. 280, says that less than twenty-five years ago

> "The government turned from the policy of keeping him (the Indian) on reservation as quiet as possible, out of the way of civilization, waiting, with no excess of patience, for the race to fade out of existence and to cease from troubling."

6. If this reservation is established as leading up to the policy of individual allotments under the present statute, it is the beginning of an outrageous wrong upon the Indians. The Indian Allotment Statute as amended provides that wherever Indians are "located upon any reservation created for their use," the President may allot to each Indian 80 acres or in case of pas-

ture land, 160 acres. Allotment Act of February 8, 1887, Sect. 1, as amended by 360 U. S. Stat. at Large, 859 (1910). On this allotment the Indian is expected to live.

The policy is well intended and undoubtedly works admirably with ordinary rich agricultural land, for it gives to the ordinary Indian family, including children, from 160 to 650 acres of land. But with regard to the Papago pueblos, such allotments would be fatal. For under the conditions of the desert country, where the Indians must move from valley to mountain twice a year and must use a large tract of country for grazing, the only system which will enable them to be independent and self-supporting is their present system of communal holdings of a very large tract of land.

The absurdity and wickedness of "allotments" in a desert country were well pointed out by Commissioner Sells at the San Francisco Conference in August, 1915. He said:

> "The use of the term 'surplus land' as applied to Indian reservations sometimes makes me impatient. It too often means that the lands remaining after the Indians of a tribe have been allotted shall be separated from them without sufficiently taking into consideration the fact that many times such allotments are wholly unfit for agricultural purposes, or insufficient to insure a subsistence when no additional provision is made for grazing and stock-raising op-

> portunities. I know of many allotments, depending entirely upon which an Indian family would starve to death, and where no white family could be induced to attempt to make a living, and yet under these circumstances an unsuccessful Indian farmer is apt to be declared a failure. There are thousands of acres of land on Indian reservations where one hundred acres would not feed a rabbit. I suggest that hereafter we photograph the 'Painted Desert' more frequently, and less often the small alfalfa patch on a great reservation. We should at least tell the whole truth. It is prejudicial to the Indian to emphasize the small part of their possessions that are productive and withhold from the public the very large unproductive portion. In this wise it becomes wrongfully understood that they have vast and valuable possessions unused by them which should be otherwise utilized."

Mr. Sells began his address by speaking of the Papagos and he undoubtedly had the Papago country in mind as being a country where "one hundred acres would not feed a rabbit." We quote further from this address at the end of this brief.

7. In any event this order is absolutely irrelevant, for nothing that the government can do pending the decision upon this motion to dismiss the bill of complaint, can affect the case; by making this motion the government admits the allegations of the bill and the appeal must be decided accordingly. And indeed, it is beyond

the power of the President to affect in any way the vested rights and titles of the Pueblo of Santa Rosa.

POINT IX.

The executive orders and legislation regarding the Papagos (apart from the reservation order of January 14, 1916, which is discussed above) are entirely unimportant, both because they are irrelevant to the issues and because they are insignificant in amount and unimportant in character.

The executive orders are unimportant.

1. In the official "Executive Orders relating to Indian Reservations," 1912, comprising 224 pages, the orders affecting the Papagos occupy less than two pages, although the Papago country has belonged to the United States for more than fifty years, and the Papagos have numbered from five to fifteen thousand people and the territory occupied is a principality.

2. There are only four short orders in all, with two or three supplementary orders correcting the boundaries, etc.

3. All but two of these orders were made within three or four years and those two cover reservations distant respectively 60 miles southeast and 75 miles northwest from the village of

Santa Rosa, so that they can have nothing to do with the case.

4. None of the reservations are within 20 miles on the north, 60 miles on the east, 30 miles on the south or 70 miles on the west of Santa Rosa; there has been no executive action or legislation regarding the village or property of Santa Rosa or regarding any property anywhere near it, except the order of January 14, 1916. The so-called Gila Bend reservation (No. 2) and the additions to the Gila River reservation (No. 6) are outside of the distinctive Papago country and concern the Papagos only so far as Papago stragglers might come to them; and the larger part of the reservation (No. 5) is shown by the executive order to be for Maricopas and not Papagos, for the order provides that it is for the use of the "Maricopa Band or Village."

5. All of the later executive orders are very careful to provide that the reservations are subject to all existing rights.

6. All of the reservations except the first two (Nos. 1 and 2) are clearly not reservations in the ordinary sense but are reservations for the help of particular villages and for the protection of their wells. This is shown by their size, which is obviously insufficient for the occupation

and maintenance of any substantial number of families, and also by the wording of the orders.

The later small reservations for the Papagos are similar to those made for the aid or protection of villages of New Mexican Pueblo Indians, which are recognized as municipal corporations, and as owning their lands.

The propriety of proper protection from white settlers, etc., is clear in both cases and it is evident that the government has treated the Papago villages like the New Mexican pueblos. Such reservations for the benefit of New Mexican pueblos are the following:

Jemez Pueblo Reservation, Executive Orders relating to Indian Reservations, p. 124.

Laguna Pueblo Reservation, Executive Orders, p. 125.

Nambe Pueblo Reservation, Executive Orders, p. 126.

San Felipe Pueblo Reservation, Executive Orders, p. 126.

Santa Clara Pueblo Reservation, Executive Orders, p. 127.

Zuni Pueblo Reservation, Executive Orders, p. 129.

It is to be noted that these New Mexican Pueblo reservations contain the same proviso as the later Papago orders, that nothing shall affect existing rights.

The Congressional action is insignificant.

The Trial Court mentions the act of January 1, 1889 (25 U. S. Statutes, 629) granting a right of way over the Papago Indian reservation in *Maricopa County*, which is outside of the Papago country. Another act mentioned is that of August 5, 1882 (22 U. S. Statutes 229), which grants a right of way across the San Xavier reservation *but expressly provides that it shall be subject to the consent of the Indians.* The only other act mentioned (apart from the appropriation acts of 1912 and 1914) is an appropriation for the "farmer in charge of the San Xavier reservation."

This legislation shows no attitude on the part of Congress either toward the Papagos or their villages or their rights.

POINT X.

This suit does not constitute any interference with the administrative functions of the defendants, nor is it a suit against the Government, nor is it an action for trying the title to land.

The law is absolutely settled to the above effect by two cases.

Gauthier v. Morrison, 232 U. S., 452, was a case against the officials of the Land Office, closely like the present, except that Indians were

not involved. The objection was strongly pressed that it was in effect an action against the government to control the discretionary functions of officials, but this Court held that where one has a clear right to land, any government official who attempts to interfere with that right, even though in good faith and apparently in the performance of official duties, is an ordinary wrongdoer and will be restrained by the court as any other individual.

Lane v. Watts, 234 U. S. 525, which arose in the Supreme Court of the District of Columbia and which was also strikingly similar to ours. This Court held (Syllabus):

> "A suit to restrain the Secretary of the Interior and the Land Commissioner from doing under color of their office an illegal act which will cause a cloud upon title of complainant is not one against the United States; nor in this case is it one for recovery of land merely or an attempted appeal from the decision of the Interior Department or a trial of title to land not within the jurisdiction of the court and wherein the United States is not present or sueable."

POINT XI.

This Court, in the exercise of its appellate jurisdiction, has power to make such disposition of this case as justice may at this time require.

> *Watts, Watts and Company, Limited, v. Unione Austriaca Di Navigacione etc.*, decided November 4, 1918, 1 U. S. Supreme Court Advance Opinions 1918-19, page 1.

Justice at this time requires, under all the circumstances of this most remarkable case, that the decree of the Court of Appeals of the District of Columbia be enforced [Transcript, folio 32] in its entirety.

LASTLY.

On all grounds the decision should be for the Indians.

They are worthy people, deserving well of our country. Commissioner Sells knows them well and speaks for them. In his address at a conference held in San Francisco in August, 1915, as appears from a pamphlet sent out by the Indian Bureau, he said:

> "For a long time I have desired to visit the Indians of the Southwest that I might closely study their problems. I have spent the last several weeks among the Apaches, Pimas, Papagos, and the Indians along the

Colorado River. About a week of this time was given to the Papago country. For many reasons I am convinced that the Papago Indians are among the most deserving of any people I have ever known. THEIR HOME FOR MORE THAN TWO HUNDRED YEARS HAS BEEN IN THE DRIEST DESERT OF THE UNITED STATES. NO BRANCH OF THE CAUCASIAN RACE COULD EXIST UNDER SUCH CONDITIONS, AND I DOUBT IF THERE IS ANOTHER INDIAN TRIBE THAT WOULD DO SO. Under these circumstances they have demonstrated that the genius of necessity works out wonderful things. THE PAPAGOS HAVE MADE THEIR STRUGGLE UNASSISTED, AND THEIR ACCOMPLISHMENTS IN VIEW OF THEIR TREMENDOUS OBSTACLES ARE MARVELOUS. Altogether they are entitled to more kindly consideration than they have received, and it is my firm purpose to show the Papagos that we are willing to help those who have so valiantly helped themselves."

To recognize the Indians' community and titles is only fair. A decision for the plaintiff will show the Indians that our nation has fairly fulfilled its obligations—its moral obligations toward the aboriginal owners and rulers of Papagueria, who have done no wrong to the United States and who have come under the power of the United States through no act of theirs—its treaty obligations under the treaties with Mexico whereby the United States agreed with Mexico for the benefit of these peoples to respect their rights and property—its obligation to carry out the promises made to them by

Major Emory in 1847, as shown by our quotation from his report—and its moral obligation of gratitude to a people who have always been peaceful and inoffensive and who, whenever need was, left their fields and flocks and fought for the protection of our citizens against the Apaches.

To recognize the Indians' community and titles is the sensible thing to do. As Commissioner Sells says, these Indians can handle this desert country better than anyone else—much better than the United States Government ever can or will do. They have been studying this job for hundreds of years and they have learned it well: both as a reward for the past and as a prudent thing for the future, they should be confirmed in their ownership of their desert land and then we should help them, if we can, to do their work better. Their own history proves that their own management of the country is successful and the experience of the New Mexican Pueblos proves that if they own their land and are protected by legislation from the whites, their future will be happy.

To recognize the Indians' community and titles is the best possible thing for the Indians. It will insure the preservation, progress and welfare of the Papago Pueblos, and if, on the other hand, their titles are not recognized and the Indians and their country are turned over

to the government, their progressive pauperization, degradation and extermination is certain. Commissioner Sells says that no Caucasian race could have lived in this desert, and no Caucasian government is wise enough to do as well for these desert Indians as they can do for themselves.

To recognize their land titles, including their mineral rights, and their water rights, is to effectively and forever protect the Indians against the encroachment of the whites, assuming that Congress casts about them proper restriction to prevent whites from taking advantage of their ignorance.

To recognize their land titles is to protect the self-respect of the Indians and maintain them as free and self-supporting men; and on this basis a policy of education and intelligent help will make desert Papagueria a prosperous section of our country and will give to the Papago Indians a prosperous and happy future. Any other policy whatever, whether it be the old reservation policy or the policy of breaking up the tribal relations and allotting scraps of land to the Indians individually, will certainly be a failure and a crime against these inoffensive aboriginees. Neither an individual nor a pueblo can progress without self-respect and self-respect can not be preserved unless men are free and self-supporting; the idea of developing men and citizens and

communities by treating them like slaves or children or paupers or dependents has been proved to be, and must necessarily be, absolutely hopeless and impossible.

To recognize their titles is to preserve and develop the simple but entirely adequate civilization of these aboriginal people. It is a civilization which has grown up on the soil, which is appropriate for the situation, which serves the needs of the people themselves and which is fine and worthy in many ways. To destroy this civilization with the heavy hand of government is to do the people a great wrong for it is bred in their bone and a part of their lives; and there is no need to destroy it. In our hours of national self-examination, we blame ourselves because all of our Indian policies have been failures, whereas the Canadians on the one side and the Spanish on the other, instead of degrading their aboriginal peoples, have preserved and developed them. But the whole difference lies simply in this; Spain and Canada have respected the Indians' laws and customs and character and titles, whereas we, except in the case of the Pueblo Indians, have insisted on destroying everything Indian and trying to replace it with what is English, a method both cruel and wholly unsuccessful.

Recognition of the Indians' titles is in conformance with the sound and approved policy of the friends of the Indians. A judgment for the Pueblo of Santa Rosa will put the Papago Indians in the position in which the government and the friends of the Indians are trying to put all Indians,—that is, in the position of self-respecting and self-supporting land owners. It is hard to explain how Secretary Lane, an able and enlightened man, can bring himself to oppose the claims of the Indians in this suit. Apparently he is trying by this suit to have it declared that the Indians are paupers so that by the grace of Congress and as a result of influence brought to bear on Congress by the friends of the Indians, the Papagos may afterward be put back in the very situation in which they have been for hundreds of years; apparently the government is trying to take away their lands for the purpose (we hope) of giving the land back to them.

No one could improve on Commissioner Sells' statement in his Report for 1915 to the Secretary of the Interior, p. 7:

> "Being thoroughly convinced that their material and industrial prosperity is more closely attached to their landed interests, the development of agriculture and stock raising has been given an impetus never before undertaken. * * * Poverty or dependence on others saps the energies of any man. The Indian is no exception, and I have

> placed the greatest work of this office on his material advancement. As his herds increase and his lands produce the Indian becomes better prepared to assimilate the knowledge which comes from the study of books. Love of home and domestic happiness follow as a natural consequence."

This is the parting of the ways for the Papago Pueblo Indians. This Court must decide whether they shall follow the course of the New Mexican Pueblos with their own lands and rights protected by the Courts or whether they shall follow the course of the wild Indians which leads to pauperism and degradation. The defendants, government officials, with the best intentions in the world are attempting to destroy the rights allowed to the Indians by the Spaniards and by the treaties—rights which have been their salvation for the last sixty years and rights which will leave them free and independent for the future—and to assert and exercise rights which they have never claimed against the Papagos and which the law does not give them.

We respectfully submit that the judgment of the Court below must be affirmed.

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